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Figure This: Judging or Federal Fraud? A Proposal To Criminalize Fraudulent Judging and Officiating in the International Figure Skating Arena

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Figure This: Judging or Federal Fraud?

A Proposal To Criminalize Fraudulent Judging and Officiating in the International Figure Skating Arena

by KELLY KOENIG LEVI*

I. Introduction	98
II. Federal Fraud	104
A. Mail Fraud.....	104
B. Wire Fraud.....	109
C. Fraud in the Sale or Purchase of Securities.....	111
D. Conspiracy To Commit Any Offense Against the United States.....	116
III. Parallels Between Federal Fraud and International Figure Skating Judging and Officiating	117
A. Mail Fraud and Wire Fraud	117
B. Securities Fraud.....	123
C. Conspiracy to Commit Federal Fraud	127
IV. Proposed Law	128
A. Jurisdiction.....	129
B. Proof and Enforcement	138
V. Support For Congress to Enter the International Figure Skating Arena.....	140
A. Globalization of Sport and Protection of American Entertainment	140
B. Achieving a Purpose of Punishment and Regulating Immoral Behavior.....	144
VI. Conclusion	147

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I. Introduction

As Jamie Sale skated a brilliant 2002 Olympic performance in the pairs figure skating event, the ice beneath her did not seem to be the least bit “thin.” Similarly, as partner David Pelletier kneeled down to kiss the ice following their performance, the ice beneath his knees and lips did not feel “thin” at all.

In reality, however, the sport of figure skating proceeded on very thin ice that February 11th evening. In a five to four vote, the judges awarded the Russian pair, Elena Berzhnaya and Anton Sikharulidze, the gold, and the Canadian pair, Jamie Sale and David Pelletier, the silver.¹ One hour later – about the same time the spectators and commentators easily concluded that the Canadians’ flawless performance surpassed the Russians’ “bobbled” routine – French judge Marie-Reine Le Gougne confessed to fellow judges that she made a deal with unspecified Russian judges: first place for the Russian team in the pairs event in return for first place for the French team in the ice dancing event.² Several days later, the French ice dancing team won the gold medal.³ Le Gougne later confessed that French Skating Federation President Didier Gailhaguet pressured her to place the Russian pair ahead of the rival Canadian team.⁴ Quickly thereafter, however, Le Gougne denied that Gailhaguet, or anyone else, ever pressured her.⁵ In immediate, yet stunning, fashion the International Olympic Committee (IOC) awarded Sale and Pelletier a duplicate gold medal.⁶ The world looked on perplexed as the four gold medalists stood on the podium.

Less than three months later, the International Skating Union (ISU) concluded that prior to the Olympic pairs event Gailhaguet in-

1. The United States, Canadian, German and Japanese judges placed the Canadians in first; judges representing the “old communist-oriented bloc” of Russia, the Ukraine, China and Poland, along with France, placed the Russians first. Mark Sappenfield, *The Cultural Vagaries Behind Ice-Judging ‘Madness’* <<http://www.csmonitor.com/2002/0214/p01s04-ussc.html>> (Feb. 14, 2002).

2. *CNN SI, 2002 Olympics, Figure Skating, French Twist: Skating Judge Denies She Made A Deal For Scores* <http://sportsillustrated.cnn.com/olympics/2002/figure_skating/news/2002/02/18/french_judge_ap/> (Feb. 18, 2002).

3. Marina Anissina and Gwendal Peizerat, of France, won the gold; a Russian team won the silver.

4. See *CNN SI, supra* n. 2. After initially admitting in front of four witnesses that Gailhaguet did pressure her to back the Russians, she has since denied it, contending that she “judged in [her] soul and conscience. . . [she] considered that [sic] the Russians were the best. . . [she] never made a deal with an official or a Russian judge.”

5. Christopher Clarey, *A Disquieting Hearing With Shortcomings for 2 French Skating Officials*, N.Y. Times § 8 at 6 (May 5, 2002).

6. See *CNN SI, supra* n. 2.

structed Le Gougne to place the Russian pair in first place.⁷ Despite Le Gougne's initial confession that she made a deal with unspecified Russian judges, the ISU did not investigate any such allegations.⁸ Instead, following a two-day hearing in April 2002, the ISU suspended Le Gougne indefinitely from any involvement in international skating and suspended Gailhaguet for three years and banned him from the 2006 Olympic games.⁹ In doing so, the ISU ruled that they "colluded to fix the results of the pairs event at the 2002 Winter Games."¹⁰

Although the "Salt Lake Scandal" seemed to conclude in April 2002,¹¹ it surprisingly resurfaced nearly six months later, further tarnishing the sport's image. In late July 2002, an alleged Russian mobster, Alimzhan Tokhtakhounov, was arrested on charges of involvement in fixing the two Olympic figure skating events that resulted in the suspensions of Le Gougne and Gailhaguet.¹² Tokhtakhounov is accused of scheming to persuade Le Gougne, and possibly five other judges, to fix the Olympic pairs and ice dancing events. Although Le Gougne and Gailhaguet denied having any contact with Tokhtakhounov,¹³ authorities remain committed to unraveling the allegations of his involvement. In fact, numerous telephone calls between Tokhtakhounov and others, which investigators used to arrest and indict

7. See *infra* nn. 8, 10.

8. See Selena Roberts & John Tagliabue, *Rogge Won't Rule Out Revising Skating Results*, N.Y. Times D1-D2 (August 3, 2002).

9. See ESPN, *Olympic Sports, Gailhaguet Denies Any Part of Alleged Fix* <<http://espn.go.com/oly/nes/2002/0802/1413217.html>> (Aug. 2, 2002). Despite his suspension, Gailhaguet was re-elected as president of the French Skating Federation and has acted as a spectator by purchasing a ticket to many of the major 2002-2003 international events. See Christopher Clarey, *As Championships Begin, Skating Elite Tries to Keep Focus on Ice*, N.Y. Times § 8 at 10 (Mar. 23, 2003).

10. Christopher Clarey, *2 French Officials Suspended in Skating Scandal*, <<http://query.nytimes.com/gst/abstract.html?res=F20C14F93F550C728CDDAC0894DA404482>> (May 1, 2002). The skating union concluded that Le Gougne engaged in misconduct, determining that she had proceeded on Gailhaguet's instructions rather than her own judgment when she awarded the Russian pair the gold medal. Gailhaguet, a member of the skating union's influential 11 member governing council, was cited for misconduct and suspended from the council. Le Gougne and Gailhaguet criticized the two-day hearing as "a masquerade and a farce" and continued to insist that she awarded the Russians the gold in good faith.

11. In late June 2002, Le Gougne appealed her suspension to the ISU's appeals commission claiming the council had denied her due process and failed to come up with evidence against her. Soon after, however, she dropped her appeal citing her financial inability to persist. Gailhaguet decided not to appeal, citing his desire to "mend ties with the ISU." ESPN, *Olympic Sports, French Skating Judge Drops Appeal of Suspension*, <<http://espn.go.com/oly/news/2002/0725/1409968.html>> (July 25, 2002).

12. Amy Shipley, *Russian Implicated in Olympic Scandal*, Washington Post A1 (Aug. 1, 2002).

13. See ESPN, *supra* n. 9; see *infra* n. 14.

Tokhtakhounov, demonstrated the complexity of the problem and provided support for the current review of the scores recorded in the Salt Lake pairs and ice dancing events.¹⁴ Although the ISU maintains that its investigation uncovered Gailhaguet's role in the controversy, the extent of judges' involvement remains unknown. As a result, months after the 2002 Olympics, the IOC has not ruled out the possibility of recalculating the results of both the Olympic pairs and ice dancing events.¹⁵

Aside from the involvement of an alleged Russian mobster, the Salt Lake Scandal did not surprise competitive figure skaters or their followers.¹⁶ In fact, following the IOC's decision to remedy the scandal by awarding a duplicate gold medal to Sale and Pelletier, several former competitors thought about asking for one too. Canadian Elizabeth Manley could have made the case in the 1988 Olympics when she finished second behind Katarina Witt in the Women's event. Likewise, American Linda Fratianne won a silver medal in the 1980 Olympics under circumstances similar to Sale and Pelletier's.¹⁷

Besides the impact of the Salt Lake Scandal on the perception of skaters and fans, there is more concrete evidence to demonstrate the fragility of the sport. During the 1998 Olympics, a Canadian figure skating judge tape-recorded a Ukrainian judge's phone call to her, in which he explained what order competitors would finish in the upcoming ice dancing event.¹⁸ In 1999, a Russian judge and a Ukrainian

14. See *ESPN, Olympic Sports, Alleged Russian Mobster Accused of Olympic Skating Fix*, <<http://espn.go.com/oly/news/2002/0731/1412258.html>> (July 31, 2002). The complaint against Tokhtakhounov suggests that 2002 Olympic skaters may also have been involved in the scheme to fix the pairs and ice dancing events. Complaint, *United States of America v. Alimzhan Tokhtakhounov*, July 22, 2002, filed in Southern District of New York, United States Magistrate Judge Andrew Peck; at ¶9(g).

15. See Roberts & Tagliabue, *supra* n. 8.

16. Retired French ice dancer, Isabelle Duchesnay said she wasn't surprised by the scandal. The silver medallist at the 1992 Winter Olympics said, "[a]ll the titles are decided ahead of time. . . [t]he corruption is so institutionalized that it had to break out some time. At Albertville, some officials came to see us before the start of the free program, and said, 'We're sorry, but you'll only get the silver medal.'" *CNN, 2002, Olympics, Figure Skating, French Skating Officials Urge Cleanup*, <http://sportsillustrated.cnn.com/olympics/2002/figure_skating/news/2002/02/france_reaction_ap> (Feb. 16, 2002).

17. *CNN, 2002, Olympics, Figure Skating, Righting Wrongs*, <http://sportsillustrated.cnn.com/olympics/2002/figure.skating/news/2002/02/15/skaters_reaction.ap1> (Feb. 15, 2002). Fratianne, who finished second to East Germany's Anett Poetzch, has been told that judges voted along geopolitical lines to prevent her from winning the gold medal. She has also stated that her mother heard two judges in a bathroom say that Fratianne was going to get the silver.

18. Christopher Clarey, *2 French Officials Suspended in Skating Scandal*, <<http://query.nytimes.com/gst/abstract.html?res=F20C14F93F550C728CDDAC0894DA40>>

judge were barred for several years from international judging, after they were caught on videotape exchanging signals during the pairs competition at the World Championships.¹⁹ Furthermore, Gailhaguet himself has a record of inappropriate behavior. Just months before the 1994 Olympics, he sent a letter to all French federation judges encouraging them to attend a meeting to discuss how to gain political influence among other judges and to initiate what he called a “conquering strategy for France.” According to a French judge, this meant “coming up with a strategy to fix skating events at the Olympics.”²⁰ Since then, several French judges have come forward to allege that Gailhaguet and the French federation threatened to destroy their judging careers if they did not go along with Gailhaguet’s pressure to fix major events.²¹

Although figure skating judging has been questioned for many years, the Salt Lake Scandal brought it to the forefront. In light of the seriousness of judges’ and officials’ improprieties, and the common knowledge that such behavior is chronic, the ISU’s punishment is not an adequate solution. Numerous judges and skating fans have proposed that any judge or official found guilty of an ethical violation should be banned for life from judging or officiating.²² Similarly, the

4482> (May 1, 2002). The Ukrainian judge, Yuki Balkov, is again under scrutiny following his decision to place the 2002 French ice dancing team in first place. See ESPN, *supra* n. 14.

19. *Id.* American judges have indicated that they have been approached to engage in similar activities. Franklin Nelson, a respected longtime figure skating judge, indicated that a foreign judge approached him to discuss his voting at an international competition in the 1970s. Robert Sullivan, *Pride and Prejudice at the Olympics*, <<http://www.time.com/time/olympics2002/article/0,8599,203646,00.html>> (Feb. 18, 2002).

20. 60 Minutes, “Scandal on Ice” 11-12 (CBS Apr. 28, 2002) (TV broadcast, transcript available from CBS, vol. XXXIV, no. 33). After years of pressure, Judge Vandenbroeck – a recipient of the letter – went public with his refusal to fix events. As a result, he was expelled from the federation. Furthermore, Francis Betsch, a French international figure skating judge from 1987 to 1998, has announced that Gailhaguet instructed him to put a German skater in the top eight at the 1994 European championships and to low score the top German woman at the 1996 World championships. ESPN, *Olympic Sports, Gailhaguet Denies Betsch’s Allegations*, available at <<http://www.espn.go.com/oly/news/2002/0409/1365229.html>> (Apr. 9, 2002).

21. See 60 Minutes, *supra* n. 20 at 11–12. This is a common sentiment among judges. When questioned as to why Marie Reine Le Gougne may have subsequently denied that she had been pressured by the French Federation, fellow French Judge Giles Vandenbroeck admitted that she would be “finished as a judge” had she “attacked Gailhaguet.”

22. See USFSA, *USFSA Home, USFSA Proposes Platform for International Judging Reforms – System Selection and Sanctions*, available at <www.usfsa.org/news/2001-02/reforms-proposed.htm> (accessed May 1, 2002). See generally John Runyon, *The PetitionSite.Com, Remove International Skating Union from the Olympic Movement*, <[http://www.thepetitionsite.com/takeaction/672918216?ts=1048573305&sign\[partner_userID\]=845235200&sign\[memberID\]=845235200&sign\[partnerID\]=1](http://www.thepetitionsite.com/takeaction/672918216?ts=1048573305&sign[partner_userID]=845235200&sign[memberID]=845235200&sign[partnerID]=1)> (accessed May 1, 2002).

ISU has proposed a new judging system intended to reduce the chances of block judging,²³ which has helped bring the sport to its current fragility.²⁴ In June 2002, the ISU voted to accept an immediate change in the number and selection process of judges and agreed to test an entirely new scoring system at selected international competitions during the 2002-2003 season, with the intent of applying the new system to all international competitions thereafter.²⁵ Although welcome advancements, these solutions are not adequate either. Judges and officials guilty of knowingly engaging in fraudulent activity must be subject to criminal sanctions.

This article proposes a federal law to complement the suggestions of fans, judges, and the ISU alike. More specifically, the pro-

"I feel that unfair judging continues to prevail. Changes need to be made and some judges definitely [sic] need to be remove [sic]."

23. Block judging, where a group of judges from various countries get together before an event and agree on the final outcome, is allegedly prevalent in figure skating. Jean Senft, a Canadian judge, has alleged that this occurred at the 1997 Grand Prix championships in Munich when the Russian ice dance team fell, but was awarded first place by a block of judges. *See 60 Minutes*, *supra* n. 20 at 12-13.

24. *CBSNEWS.com, Eye on Sports, Changes Urged for Olympic Skating*, <<http://www.cbsnews.com/track/search/stories/2002/02/13/sports/main329236.shtml>> (Feb. 19, 2002). At least two proposals are under consideration. One, offered by ISU President Ottavio Cinquanta, suggests replacing the current system of nine judges and a 6.0 scale with a system in which 14 judges award points based on points per element. Such system would use a computer to randomly select 7 of the 14 judges marks, making it virtually impossible to fix an outcome of an event. The United States Figure Skating Association (USFSA) has suggested maintaining the 6.0 system, but dropping the high and low marks and displaying the median of the other seven scores. Furthermore, this proposal includes selecting the judges by geographical region rather than the current system of blind draw. Specifically, no more than two judges from any one world zone would be allowed to sit on the same panel. E.M. Swift, *Figuring It Out: How Will Skating Get Its House in Order After the Salt Lake Scandal?* *Sports Illustrated* 19 (May 13, 2002).

25. *See Summary of New Judging System for Figure Skating*, <<http://www.isu.org/news/judgingsummary.html>> (accessed Nov. 19, 2002). Under the new system, the panel of 9 judges has been expanded to 14. A computer randomly and secretly selects 9 judges of the 14 whose scores will be used. All 14 scores will be presented on the scoreboard, but no one – including the judges – will know which scores were used. *Figure Skating: ISU Reports Successful Test of New Judging System* <<http://www.sportserver.com/Olympics/story/529452p-4192982c.html>> (Sept. 9, 2002). Although admirable as an attempt to eliminate improper activity, the new system has drawn criticism throughout the 2002-2003 skating season from fans, skaters, and officials alike. The system maintains the anonymity of the judges but simultaneously makes it impossible for skaters to know which scores actually count. Olympic, World, and National medallist Michelle Kwan has complained that skaters can no longer approach specific judges for criticism; ISU committee members have resigned over similar reactions. *See* Christopher Clarey, *As Championships Begin, Skating Elite Tries to Keep Focus on the Ice*, *supra* n. 9; *see also* *Deciphering The Mysteries of Figure Skating Judging*, <<http://www.msn.espn.go.com/oly/s/2003/0326/152088.html>> (Mar. 26, 2003). Clearly, a new judging system is not the final answer to judging and officiating impropriety.

posed law would make it illegal for any person who moves in, or affects, interstate or foreign commerce, to knowingly engage in any fraudulent activity, or attempt to knowingly engage in any fraudulent activity, that may affect the scoring of any skater or team of skaters or the outcome of any international skating event, when such international figure skating event takes place in the United States.²⁶ Although the statute is broad enough to include a person other than a judge or official, such as Tokhtakhounov or rival skaters partaking in international competitions, this Article will focus on use of the statute to prevent and punish activity by figure skating judges and officials. It is this activity that has primarily crippled the sport of figure skating.

Part I of this Article discusses the purposes of several federal fraud statutes, including mail fraud, wire fraud, and securities fraud, along with conspiracy to commit such fraud. In doing so, this section will discuss the types of actions these statutes seek to prevent. Also this section will provide analysis of specific fraud claims and the elements and intricacies of such claims. Part II will argue that the fraudulent activity prevalent in international figure skating judging and officiating involves behavior strikingly parallel to that which the federal fraud statutes seek to prevent. Thereafter, Part III will propose a federal statute to address the now chronic problem in figure skating. In doing so, it will argue that Congress has jurisdiction pursuant to the Commerce Clause authority and will discuss the requisite mental state along with potential difficulties relating to proof and enforcement of the statute. Part IV will offer additional support for Congress to intervene into the figure skating arena. More specifically, it will discuss the globalization of sport and the need for Congress to ensure that American culture is exhibited with integrity and honesty abroad. Furthermore, Part IV will argue that Congress should enact the proposed law to protect Americans' entitlement to honest entertainment. Finally, it will suggest that the proposed law will deter judges and officials from engaging in fraudulent activity when presiding over international figure skating competitions hosted in the United States and will punish immoral behavior when such actors are not deterred.

26. For purposes of the proposed law, a figure skating event includes singles skating, pairs skating and ice dancing. For example, the 2003 World Figure Skating Championships in Washington, D.C. marked the 11th time a United States city hosted the World Championship event since New York was the first city to host the Competition in 1930. See *Washington Will Be Focus of Figure Skating World in 2003*, available at <<http://www.usfsa.org/worlds02/html>> (accessed Mar. 24, 2003).

II. Federal Fraud

A. Mail Fraud

1. Development of Mail Fraud

The mail fraud statute, 18 U.S.C. § 1341, originated in the 1800s with Congress' intent to target schemes whose purpose was to deprive another of money or property through the mails.²⁷ To prove mail fraud under 18 U.S.C. § 1341, the government must show that the accused (1) intentionally participated in a scheme or artifice to defraud; (2) with the specific intent to defraud; and (3) used the United States mails to carry out that scheme or artifice.²⁸ Violators are subject to a fine of up to \$1,000, imprisonment up to 5 years, or both, for each violation.²⁹

Early on, a wide array of case law developed, focusing on a scheme or artifice to defraud, by use of the mails or to deprive another of money or property.³⁰ More recently, however, prosecutors and scholarly research have focused on what is known as the intangible rights doctrine. The doctrine holds that certain individuals are entitled to the honest and faithful services of a public official or private fiduciary.³¹ Since the 1940s, courts have applied the doctrine in a broad fashion; most often focusing on public or quasi-public officials who owe and allegedly failed to provide honest and faithful services to a specific body of people.³² Courts regularly found that failure to provide these services, with the use of mails to further the failure, was

27. Daniel W. Hurson, *Mail Fraud, The Intangible Rights Doctrine, and The Infusion of State Law: A Bermuda Triangle of Sorts*, 38 Hous. L. Rev. 297, 301 (2001).

28. *U.S. v. Antico*, 275 F.3d 245, 261 (3rd Cir. 2001) (citing *U.S. v. Clapps*, 732 F.2d 1148, 1152 (3d Cir. 1984)); *U.S. v. Hooshmand*, 931 F.2d 725, 731 (11th Cir. 1991). The current federal mail fraud makes it illegal to "devise or intend to devise any scheme or artifice to defraud, or obtain money or property by means of false or fraudulent pretences, representation, or promises . . . for the purpose of executing such schemes or artifice or attempt to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by an private or commercial interstate carrier." 18 U.S.C. § 1341 (2000). In 1994, the mail fraud statute was amended, as is indicated above, to also include mail delivered by "any private or commercial interstate carrier." 18 U.S.C. § 1341 (2000).

29. 18 U.S.C. § 1341 (2000).

30. See Hurson, *supra* n. 27, at 303 (citing Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 779-86 (1980)).

31. See Hurson, *supra* n. 27, at 303-304.

32. *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1168 (11th Cir. 1997) (citing *Shushan v. U.S.*, 117 F.2d 110 (5th Cir. 1941)).

a crime under 18 U.S.C. § 1341.³³

In 1987, however, the Supreme Court in *McNally v. United States* turned the clock back and narrowed the mail fraud statute by concluding that the intangible rights theory was beyond the scope of the statute.³⁴ The Court elaborated that if Congress wished to broaden the scope beyond money and property rights, it needed to speak more clearly. In 1988, Congress responded by passing 18 U.S.C. § 1346, which clarified that the mail fraud statute extended to any “scheme or artifice” to deprive another of the intangible right to honest services.³⁵ This section overturned *McNally* and, therefore, protected one’s right to honest services, including one’s right to receive honest services from public officials.³⁶

2. Types of Behavior Addressed by § 1346

Courts have applied § 1346 to a range of schemes to defraud by use of the mails, many of which often involve schemes to deprive the public of the right to the honest services of governmental employees, officers or agents. Soon after the enactment of § 1346, the Fifth Circuit, in *United States v. Brumley*,³⁷ confirmed that the § 1346 language – intangible right to honest services – includes honest and impartial government and, therefore, reinforced pre-*McNally* law. For example, a federal district court elaborated on this idea in *United States v. Frega*,³⁸ where two California state judges were charged with violating federal law by accepting gifts from local attorneys while understanding that doing so would corruptly influence them.³⁹ The court rejected the argument that there could not be a § 1346 violation because scheme to defraud does not encompass public corruption.⁴⁰ The court pointed to the legislative history of § 1346, which the Senate Judiciary Report noted included the right of the public to the honest services of

33. See e.g. *U.S. v. Silvano*, 812 F.2d 754 (1st Cir. 1987); *U.S. v. Margiotta*, 688 F.2d 108, 120-21 (2d Cir. 1982); *U.S. v. Clapps*, 732 F.2d 1148, 1152 (3d Cir. 1984); *U.S. v. Frankel*, 721 F.2d 917, 920 (3d Cir. 1983); *U.S. v. Barber*, 668 F.2d 778, 784-85 n. 4 (4th Cir. 1982); *U.S. v. Mandel*, 591 F.2d 1347, 1359-62 (4th Cir. 1979); *U.S. v. Gray*, 790 F.2d 1290, 1294-95 (6th Cir. 1986); *U.S. v. Alexander*, 741 F.2d 962, 964 (7th Cir. 1984).

34. *McNally v. U.S.*, 483 U.S. 350, 360 (1987). See generally *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

35. 18 U.S.C. § 1346 (1994).

36. See *U.S. v. Holley*, 23 F.3d 902, 910 (5th Cir. 1993); *U.S. v. Dischner*, 974 F.2d 1502, 1518 n. 16 (9th Cir. 1992); *U.S. v. Thomas*, 32 F.3d 418, 419 (9th Cir. 1994); *U.S. v. DeFries*, 43 F.3d 707, 709 n. 1 (D.C. Cir. 1995).

37. 116 F.3d 728 (5th Cir. 1997).

38. 933 F. Supp. 1536 (S.D. Cal. 1996).

39. *Id.* at 1538.

40. *Id.* at 1545-46.

public officials.⁴¹ Thereafter, the court emphasized that a citizen, or group of state citizens, could be the victim of the public corruption fraud.⁴² Thus, in *Frega*, judges deprived the people of the State of California of honest services in violation of § 1346.⁴³

Many § 1346 prosecutions have focused on schemes involving the bribery of public officials and actions in furtherance of conflicts of interest. When looking at these cases more carefully, it is evident that § 1346 seeks to punish public officials for breaching, or acting contrary to, a known duty to achieve a personal benefit. For example, in *United States v. Lopez-Lukis*, the defendants were charged with federal mail fraud for allegedly devising a scheme to deprive the citizens of Lee County, Florida, and the State of Florida, of their intangible right to honest services.⁴⁴ Defendant Lopez-Lukis, a member of the Lee County Commissioners Board (“Board”), accepted money from defendant Lukis, a lobbyist who represented clients before the Board, to influence her actions as a county commissioner.⁴⁵ The prosecution alleged that Lopez-Lukis used her position for the benefit of Lukis’ clients. More specifically, the defendants concealed their monetary relationship from the public and tried to prevent a candidate – who opposed the interests of Lukis’ clients – from overtaking the position of a Board member who voted in favor of Lukis’ clients.⁴⁶ To do so, the defendants allegedly threatened that if the candidate did not withdraw, they would make public a videotape showing her participating in adultery.⁴⁷

The court noted that elected officials generally owe a fiduciary duty to the electorate, which is the most sacred duty owed.⁴⁸ Furthermore, the court reasoned that a public official deprives his or her

41. *Id.* at 1544 (citing Senate Judiciary Report detailing the Congressional intent in enacting § 1346).

42. *See U.S. v. Sawyer*, 85 F.3d 713, 733 (1st Cir. 1995); *U.S. v. Waymer*, 55 F.3d 564, 568-69 (11th Cir. 1995) (concluding that the defendant defrauded the citizens of Atlanta their right to honest services). *See generally U.S. v. Castro*, 89 F.3d 1443 (11th Cir. 1996).

43. 933 F. Supp. at 1546. *See generally Castro*, 89 F.3d at 1443 (finding no reason to read § 1341 and § 1346 to exclude states and governmental entities from the mail fraud statute’s protection).

44. 102 F.3d 1164, 1165 (11th Cir. 1997).

45. *Id.* at 1166.

46. *Id.*

47. *Id.* (When the candidate did not withdraw, the defendants distributed the tape to the media).

48. *Id.* at 1169. *See generally U.S. v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996) (when addressing a § 1346 claim, the court noted that “citizens elect public officials to act for the common good. When official action is corrupted by secret bribes . . . , the essence of the political contract is violated”).

constitutes of their right to have him or her perform those official duties when he or she uses the position for personal gain.⁴⁹ After concluding that Lopez-Lukis, an official, committed honest services fraud when she received a personal benefit by accepting Lukis' bribe, the court emphasized that it was honest services fraud when Lopez-Lukis took steps to influence actions of the entire Board.⁵⁰

Interestingly, courts do not require the government to prove that the defendant personally owed a duty of honest services to the victim of a scheme to defraud in order to state a § 1346 violation. Rather, courts regularly find a viable charge when a non public official engages in a scheme to defraud the public of honest services by bribing a public official. For example, in *United States v. Sawyer*,⁵¹ an insurance company's senior lobbyist was found to be properly charged under § 1346 based on allegations that he made illegal payments to members of the Massachusetts Legislature on his company's behalf.⁵² Defendant Sawyer paid for nearly \$25,000 in entertainment fees for members of the Insurance Committee of the Massachusetts Legislature,⁵³ all in violation of two state gift and gratuity giving statutes.⁵⁴ The court concluded that the government properly charged him with engaging in a scheme to deprive the state and its citizens of their right

49. *Id.* See generally *U.S. v. ReBrook*, 837 F. Supp. 162 (S.D. W. Va. 1993), *aff'd in part, rev'd in part on other grounds*, 58 F.3d 961 (4th Cir. 1995) (finding that appointed state officials owe a fiduciary duty, not because of the positions which they occupy, but merely because they hold a position within state government). But see *U.S. v. Sancho*, 157 F.3d 918 (2d Cir. 1998), where court concluded that a plain reading of § 1346 did not reveal any requirement that a defendant deprive a victim of honest services "of a fiduciary." The court noted that the government has to establish that some harm or injury was contemplated by the schemer, but a fiduciary relationship was not vital for culpability to attach.

50. *Id.*

51. *Supra* n. 42 at 713.

52. *Id.* at 713-22.

53. *Id.* at 720-21.

54. *Id.* at 727. The two statutes, upon which the honest services theory is based, are the gift and gratuity statutes. The gift statute provides: "No legislative agent shall knowingly and willfully offer or give to a public official or public employee or a member of such person's immediate family, and no public official or public employee or member of such person's immediate family shall knowingly and willfully solicit or accept from any legislative agent, gifts with an aggregate value of one hundred dollars or more in a calendar year." *Id.* at 727 (quoting Mass Gen. Laws ch. 268B, § 6 (2000)). The gratuity statute provides, "(a) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers or promises anything of substantial value to any present or former state . . . employee . . . for or because of any official act performed or to be performed by such an employee . . . (d) . . . shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both." *Id.* at 729 (quoting Mass. Gen. Laws ch. 268A, § 3 (2000)).

to the honest services of their legislators. The court further noted that the government did not charge the defendant on the theory that he owed a duty of honest services to the citizens, but on the theory that he acted intending to cause legislators to violate their duty under the laws that prevents legislators from accepting specific gifts or gratuities.⁵⁵

3. *Essential Elements of Honest Services Fraud*

As discussed above, a mail fraud conviction requires the government to show that the defendant used the United States mail to carry out a scheme or artifice to defraud. Because congressional jurisdiction is predicated by federal control over the United States Post Office,⁵⁶ and not Commerce Clause grounds, it is not necessary that a mailing cross interstate lines.⁵⁷ Nonetheless, the prosecution must show that the defendant “caused” the mail to be used for the purposes of executing the scheme,⁵⁸ which requires that the mailing merely be “incident to an essential part of the scheme.”⁵⁹

The government must also show that the accused intentionally participated in a scheme or artifice to defraud with the specific intent to defraud.⁶⁰ To show that the defendant acted with intent to scheme, the government must show some degree of planning by the perpetrator.⁶¹ The government satisfies its burden of showing specific intent if it proves that based on, or inferred from⁶², all the facts and circumstances, there exists a scheme which was “reasonably calculated to deceive persons of ordinary prudence and comprehension.”⁶³ In *United States v. Sawyer*, where an insurance lobbyist was properly

55. *Id.* at 725.

56. *See U.S. v. Griffith*, 17 F.3d 865, 876 (6th Cir. 1994); *U.S. v. Elliott*, 89 F.3d 1360, 1364 (8th Cir. 1996).

57. *Id.*

58. Anne S. Dudley & Daniel F. Schubert, *Mail and Wire Fraud*, 38 Am. Crim. L. Rev. 1025, 1043 n. 108 (Summer 2001).

59. *Id.* at 1043 n. 111; *see also Schmunck v. U.S.*, 489 U.S. 705, 710-11 (1989).

60. *See Antico*, 275 F.3d 245 (3d Cir. 2001); *Hooshmand*, 931 F.2d 725 (11th Cir. 1991); *see also U.S. v. Altman*, 48 F.3d 96, 101 (2d Cir. 1995); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986); *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902 (11th Cir. 1996).

61. *See DeMier v. U.S.*, 616 F.2d 366, 369 (8th Cir. 1980).

62. *See U.S. v. Keller*, 14 F.3d 1051 (5th Cir. 1994); *see also U.S. v. Quadro Corp.*, 928 F. Supp. 688, 696 (E.D. Tex. 1996).

63. *U.S. v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *U.S. v. Green*, 745 F.2d 1205 (9th Cir. 1985). “A liberal policy has developed to allow the government to introduce evidence that even peripherally bears on the question of intent.” *See Dudley & Schubert, supra* n. 57, at 1038-89 (quoting *U.S. v. Copple*, 24 F.3d 535, 545 (3d Cir. 1994)).

charged with a § 1346 violation for engaging in a scheme to defraud the citizens of Massachusetts by providing specific legislators with gifts and gratuities, the court concluded that the government must establish that the defendant intended to deceive the public. In doing so, the court noted that the evidence “need not compel an intent-to-deceive finding; rather, it is only required that a reasonable jury could be persuaded, beyond a reasonable doubt, that Sawyer had such intent.”⁶⁴ When presiding over § 1346 cases that involve public officials, however, courts do not require evidence of a tangible or intangible loss to the public.⁶⁵ Rather, courts reason that the public’s right to the honest services of a public official is defrauded when that official uses his or her public role to engage in dishonest actions, not merely when the official reaches a dishonest objective.⁶⁶

B. Wire Fraud

Congress enacted the wire fraud statute in 1952 as a companion to the mail fraud statute. The statute, 18 U.S.C. § 1343, makes it criminal to transmit by wire, radio or television via interstate commerce, any fraudulent representations for the purpose of completing any scheme or artifice to defraud.⁶⁷ To prove wire fraud under 18

64. *Sawyer*, *Supra* n. 42 at 733. The court added that “the evidence must show not only that Sawyer gave the unlawful gifts or gratuities with the intent to deprive the public of honest services, but that he also intended to deceive the public about that conduct.” *Id.* For other courts concluding that the government must prove that the defendant intended to deceive the public to establish a deprivation of honest services claim, see *U.S. v. Czubinski*, 106 F.3d 1069, 1076-77 (1st Cir. 1997); *U.S. v. Goldberg*, 928 F. Supp. 89, 94 (D. Mass. 1996).

65. *U.S. v. Blumeyer*, 114 F.3d 758, 766 (8th Cir. 1997). See generally *U.S. v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996).

66. *Blumeyer*, 114 F.3d at 766. Some courts require that the government prove a violation of state law in order for misconduct to constitute honest services fraud. In *U.S. v. Brumley*, 116 F.3d 728 (5th Cir. 1997), the court held that § 1346 contemplates that there must first be a breach of a state-own duty. 116 F.3d at 734. More specifically, the court reasoned that to hold that illegal conduct alone would suffice has potential to bring almost any illegal act within the province of the mail fraud statute. *Id.* Most courts, however, do not require proof that the defendant violated a law or regulation other than the mail fraud statute. *U.S. v. Bryan*, 58 F.3d 933, 940 (4th Cir. 1995); see generally *Carpenter v. U.S.*, 484 U.S. 19 (1987) (confirming that the mail fraud statute contains no predicate violation requirement); *U.S. v. Frega*, 933 F. Supp. 1536, 1548 (S.D. Cal. 1996) (relied on pre-*McNally* case law to conclude that the duty breached need not arise from state or federal law); *U.S. v. ReBrook*, 837 F. Supp. 162, 170 (D. W.V. 1993) (finding that a § 1346 indictment could be supported as long as the defendant violated ethical responsibilities; obligations under Ethics Act; or inherent responsibilities as a public employee). These courts reason that the law is concerned with “moral uprightness, fundamental honest, fair play and right dealing in the general and business life of society.” *U.S. v. Bissell*, 954 F. Supp. 841, 862 (D. N.J. 1996).

67. Robert A. Fippinger, “The Securities Law of Public Finance,” Sec. L. Pub. Fin. §

U.S.C. § 1343, the government must show that the accused (1) intentionally participated in a scheme or artifice to defraud; (2) with the specific intent to defraud; and (3) used interstate wire communications to carry out that scheme or artifice.⁶⁸ Like the mail fraud statute, violators are subject to a fine up to \$1000, imprisonment up to 5 years, or both, for each violation.⁶⁹ Unlike the mail fraud statute, the wire fraud statute is predicated upon Congress' reliance on the Commerce Clause to assert jurisdiction over the fraud.⁷⁰ As a result, the prosecution must demonstrate that the communication at issue crossed state lines, thereby satisfying the interstate requirement.⁷¹

Prior to *McNally*, the government used the wire fraud statute and the honest services theory in the same way it had carried out prosecutions under the mail fraud statute—to attack political corruption.⁷² Because mail and wire fraud provisions are construed identically, *McNally* applied to wire fraud as well, thereby holding that the intangible rights theory was beyond the scope of the wire fraud statute.⁷³ Congress responded with § 1346 to confirm that the term scheme or artifice to defraud—applied the same to the mail and wire fraud statutes—includes a scheme or artifice to deprive another of the intangible right to honest services.⁷⁴ Since then the courts have regularly found defendants guilty of wire fraud on the theory of depriving the public of their intangible right to honest services.⁷⁵

13:6.1 (2001). The wire fraud statute at 18 U.S.C. § 1343 is as follows, “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.”

68. See *Antico*, 275 F.3d at 261. The same standard applies to the “scheme to defraud” under the mail and wire fraud statutes. See *U.S. v. Boots*, 80 F.3d 580, 586 n. 11 (1st Cir. 1996).

69. 18 U.S.C. § 1343 (2000).

70. *Id.* (stating any scheme must be “transmitted by means of wire, radio, or television communication in interstate or foreign commerce”); *U.S. v. Davila*, 592 F.2d 1261, 1264 (5th Cir. 1979) (“[W]here interstate wire transmissions are at the heart of and essential to a fraudulent scheme and are of necessity interstate, the jurisdictional element is met.”).

71. See *U.S. v. Lindemann*, 85 F.3d 1232, 1241 (7th Cir. 1996).

72. See Fippingger, *supra* n. 66, at 13:6.

73. See *U.S. v. Covino*, 837 F.2d 65, 81 (2d Cir. 1988).

74. 18 U.S.C. § 1346 (1988). See *Antico*, 275 F.3d at 245 n. 16.

75. See e.g. *U.S. v. Woodward*, 149 F.3d 46 (1st Cir. 1998). *U.S. v. Rybicki*, 287 F.3d 257 (2d Cir. 2002); *U.S. v. Sancho*, 157 F.3d 918 (2d Cir. 1998); *Antico*, 275 F.3d at 245; *U.S. v. Mack*, 159 F.3d 208 (6th Cir. 1998).

C. Fraud in the Sale or Purchase of Securities

1. Development of 10b-5 Cause of Action

Like § 1346, federal securities laws seek to protect the public from being victims of fraud. Congress passed the Securities Acts of 1934 to “prevent inequitable and unfair practices and to ensure fairness in securities transactions generally,”⁷⁶ while also promoting investor confidence.⁷⁷ Section 10 of the 1934 Act enhances this intention by making it illegal to use deceptive devices or schemes in connection with the sale or purchase of securities.⁷⁸ Under power granted by Congress in Rule 10b, the Securities and Exchange Commission (SEC) promulgated Rule 10b-5 to prohibit individuals or companies from buying or selling securities if they engage in fraud in their purchase or sale.⁷⁹ More specifically, fraud includes (1) the use of any deceptive “device, scheme or artifice,” (2) “untrue statements or omissions of material facts,” or (3) any deceptive “act, practice or course of business.”⁸⁰ Therefore, Rule 10b-5 ensures that investors have, at least, the material information that is available to the corporate insiders.⁸¹ Rule 10b-5 is applied through both governmental and private actions. Government actions, which the SEC oversees, can result in imprisonment, injunctions, prohibition from participation in a specific industry, civil penalties or cease and desist orders.⁸²

76. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1986).

77. *SEC v. Zandford*, 535 U.S. 813 (2002) (quoting *U.S. v. O'Hagan*, 521 U.S. 642, 658 (1997)).

78. See 15 U.S.C. § 78j(b)(2000). See *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971).

79. See *Superintendent of Ins.*, 404 U.S. at 9.

80. 17 C.F.R. § 240.10b-5 (2001). “It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”

81. *Texas Gulf Sulphur Co.*, 401 F.2d at 848.

82. 15 U.S.C. §§ 78u, 78u-3 (2000). One found guilty of a 10b-5 criminal violation prior to November 18, 1988 could be fined up to \$100,000, imprisoned for not more than 5 years, or both. For acts taking place after November 18, 1988, the punishment was increased to fines not exceeding \$1 million (not exceeding \$2.5 million for a person other than a natural person), imprisonment of not more than 10 years, or both. Arnold S. Jacobs, 5E *Disclosure & Remedies Under the Securities Laws*, SECDSRL, § 20:161 (June 2002).

To demonstrate a Rule 10b-5 criminal violation, the government must prove the same elements as does a plaintiff seeking to establish a private cause of action except that crimi-

2. *Types of Behavior 10b-5 Seeks to Address*

Rule 10b-5 seeks to prohibit misrepresentations or omissions in the sale and purchase of securities.⁸³ Disclosure liability can result from four types of misleading actions including affirmative misrepresentations, half-truths, nondisclosure of after-acquired information, or pure omissions.⁸⁴ Either nondisclosure or pure omission violates Rule 10b-5 when there is a duty to disclose, which arises from a relationship of “trust and confidence between the parties” as is present between a corporation and its shareholders.⁸⁵ In general, courts do not impose a duty on companies to disclose corporate developments or other inside information,⁸⁶ but Rule 10b-5 does require that “material facts” be disclosed.⁸⁷ As a result, companies often face questions about disclosure beyond the mandated disclosure requirements, such as when they are concerned that such disclosure may be needed to update or correct information already released.⁸⁸ Companies must first, however, determine whether the potential public information is material at all. In *Basic v. Levinson*,⁸⁹ the Court concluded that with respect to Rule 10b-5, a fact is material if there is a “substantial likelihood that a reasonable investor would consider it important in making a decision to buy or sell a security.”⁹⁰ More specifically, there must be a substantial likelihood that a reasonable investor would have viewed the omitted fact to have “significantly altered the total mix of information made available.”⁹¹

The question of materiality was a vital issue in *Ganino v. Citizens*

nal prosecution requires that one acted “willfully.”

83. See *supra* n. 78 and accompanying text.

84. John H. Matheson, *Corporate Disclosure Obligations and the Parameters of Rule 10b-5: Basic Inc., v. Levinson and Beyond*, 14 J. Corp. L. 1, 12 (Fall 1998).

85. *Chiarella v. U.S.*, 445 U.S. 222, 228 (1980).

86. See Matheson, *supra* n. 82 at 1027; See e.g. *Basic, Inc. v. Levinson*, 485 U.S. 224 (1987).

87. *Time Warner Securities Litigation*, 794 F. Supp. 1252, 1261-63 (S.D.N.Y. 1992), *rev'd in part*, 9 F.3d 259 (2d Cir. 1993). The 1934 Act requires most publicly held companies to release material information in the form of annual and quarterly reports, along with information pertaining to proxy solicitations and tender offers. See 17 C.F.R. §§ 249.308a, 240.13a-13, 240.15d-13, 240.14a-1, 240.14a-14; 15 U.S.C. § 78(n) (2000); § 240.14a-2(2000); 15 U.S.C. §78(n)(d) (2000).

88. Larry Soderquist, *Fraud in the Purchase or Sale of Securities: Rule 10b-5*, 1179 PLI/Corp. 249, 270-71 (May 2000).

89. 485 U.S. 224 (1988).

90. *Id.* at 232.

91. *Id.* (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (addressing materiality in the Rule 14a-9 context)).

Utilities Company.⁹² Purchasers of Citizens' common stock between May 9, 1996 and August 7, 1997 alleged that Citizens violated Rule 10b-5 and fraudulently inflated Citizens' share price when their August 1996 press release and 1996 second quarter disclosure failed to release that "approximately 10 million of the \$85.1 million of reported income for the first six of 1996 should have been recognized in 1995."⁹³ The district court held that the alleged misrepresentations, or omissions, were immaterial because the fees totaled only 1.7 percent of Citizens' total revenue in 1996.⁹⁴ On appeal, the Second Circuit emphasized the Supreme Court's language in *Basic*⁹⁵ and added that it is "not necessary to assert that the investor would have acted differently"⁹⁶ – with respect to buying or selling – "if an accurate disclosure was made."⁹⁷ Nonetheless, the court did emphasize the confines of the materiality analysis by specifying that an omitted fact may be immaterial "if the information is trivial,"⁹⁸ or is "so basic that any investor could be expected to know it."⁹⁹

When applying the materiality test to the facts of *Ganino*,¹⁰⁰ the Second Circuit affirmed its commitment to rejecting a formulaic approach to analyzing the materiality of an alleged misrepresentation or omission.¹⁰¹ The court did not focus on the amount of money misstated or omitted. Instead, it noted that misstatements of income could be material because "earnings reports are among the pieces of data that investors find most relevant to their investment decisions."¹⁰² Thereafter, the court reversed the district court's finding that the omissions were immaterial as a matter of law.¹⁰³

92. 228 F.3d 154 (2d Cir. 2000).

93. *Id.* at 159.

94. *Id.* at 162.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (quoting *Basic v. Levinson*, 485 U.S. at 231).

99. *Id.* (quoting *Levitin v. PaineWebber, Inc.*, 159 F.3d 698, 702 (2d Cir. 1998)).

100. *Id.* at 154.

101. *Id.* at 162.

102. *Id.* at 164 (quoting *Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1420 n. 9 (3rd Cir. 1997)).

103. *Id.* at 166. The court also noted that materiality is evaluated in light of the circumstances existing at the time of the alleged misstatement or omission took place and not in light of hindsight after the event. *Id.* at 165 (citing *Pommer v. Medtest Corp.*, 961 F.2d 620, 625 (7th Cir. 1992)); see also *Spielman v. General Host Corp.*, 402 F. Supp. 190, 194 (S.D.N.Y. 1975).

In *Fecht v. Price Company*, 70 F.3d 1078 (9th Cir. 1995), the court addressed a similar fact pattern. Following the fall of Price's stock in April 1992, stockholders filed an action alleging 10b-5 violations based on the Company's misrepresentation of the com-

3. *Essential Elements of a Rule 10b-5 Criminal Claim*

The injured party must be a purchaser or seller of securities.¹⁰⁴ This requirement, clearly established in *Birnbaum v. Newport Steel Corp.*¹⁰⁵, was strengthened when the Court decided *Blue Chip Stamps v. Manor Drug Stores*¹⁰⁶ in 1975. The Court emphasized the negative ramifications that would result in the absence of a “purchaser-seller” requirement, including the possibility of “vexatious litigation” involving questions such as whether one would have purchased or sold securities, and the amount such potential plaintiffs would have purchased or sold.¹⁰⁷ Thereafter, the government must prove that the defendant acted with scienter.¹⁰⁸ The standard used in criminal 10b-5 cases requires that the defendant acted willfully.¹⁰⁹ Courts, however, are not uniform in their determination of the level of conduct that satisfies “willful.” Some conclude that specific intent is necessary,¹¹⁰ while others hold that recklessness is sufficient.¹¹¹ At minimum, most courts conclude that the defendant must have intended to do a wrongful act,¹¹² but need not have intended to violate the law.¹¹³

pany’s financial condition in various public statements, including shareholder reports, and Form 10Qs. *Id.* at 1080. The plaintiffs alleged that the statements were false and misleading because they omitted material adverse information regarding losses sustained in the expansion program, and thereby, operated to inflate the market price until a decline occurred one day after the Company announced a drop in quarter income. *Id.* The district court concluded that the defendants’ failure to disclose the losses sustained by the expansion program was not a material omission because the profitability of the Company as a whole was significant, rather than any one aspect of the Company’s operations. *Id.*

On appeal, the Ninth Circuit Court of Appeals reversed and determined that the jury should decide the question of materiality in the present case. The court reiterated that it takes a delicate assessment of the inferences a ‘reasonable shareholder would draw from a given set of facts and the significance of those inferences to him’ to determine whether an omission is material. Where if the adequacy of the statement is “so obvious that reasonable minds [could] not differ,” it is appropriate to conclude that the statements are not material as a matter of law. *Id.* (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)). If not, however, it is the jury’s role to determine the materiality issue. *Id.* at 1081.

104. *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 464 (2d Cir. 1952).

105. *Id.*

106. 421 U.S. 723 (1975).

107. *Id.* at 740.

108. See Soderquist, *supra* n. 88.

109. 15 U.S.C.A. § 78ff (West 1997) (as amended Nov. 10, 1998, Pub.L. 105-366, § 2(d), 112 Stat. 3303 (2002)).

110. See e.g. *U.S. v. Jones*, 380 F. Supp. 343, 344 (D.N.J. 1974).

111. See e.g. *U.S. v. Boyer*, 694 F.2d 58, 59 (3d Cir. 1982); *U.S. v. Koenig*, 388 F. Supp. 670, 712 (S.D.N.Y. 1974).

112. See *Chiarella*, 588 F.2d at 1370-71; *U.S. v. Dixon*, 536 F.2d 1388, 1395 (2d Cir. 1976); cf. *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 181 n. 7 (2d Cir. 1976); *U.S. v. Charney*, 537 F.2d 341, 352, 358 (9th Cir.).

Both reliance and causation are required to state a criminal 10b-5 claim. In *Affiliated Ute Citizens v. United States*,¹¹⁴ the court found that reliance is not necessary when material information is not disclosed at all.¹¹⁵ Courts, however, require all 10b-5 plaintiffs to prove loss causation, which demonstrates that but for the defendant's wrongdoing, the plaintiff would not have incurred the harm about which he or she complains.¹¹⁶ Finally, a 10b-5 plaintiff must demonstrate the harm he or she incurred translates to damages.¹¹⁷

113. *Charney*, 537 F.2d at 358; *Dixon*, 536 F.2d at 1395; *Arthur Lipper Corp.*, 547 F.2d at 181 n. 7.

114. 406 U.S. 128 (1972).

115. Reliance, also referred to as "transactional causation," establishes that "but for the fraudulent misrepresentation, the investor would not have purchased or sold the security." *Suez Equity Investors, L.P., Sei Assocs. v. Toronto Dominion Bank*, 250 F.3d 87, 95-96 (2d Cir. 2001). In situations involving misstatements, however, courts require a showing of reliance. This requirement accompanies the "fraud on the market theory," which allows a presumption of reliance even without any proof that the plaintiff actually relied on the defendant's misstatement. Under the theory, "[a] purchaser on the stock exchanges . . . relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price, and thus indirectly the truth of the representations underlying the stock price – whether he is aware of it or not, the price he pays reflects material misrepresentations." *Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975); see also *Basic*, 485 U.S. at 224.

116. *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990). This requirement is codified in the 1995 Private Securities Litigation Reform Act, section 21D(b)(4), which states: "In any private action arising under [the Exchange Act], the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate [the Act] caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4) (2000).

117. *Newton v. Merrill Lynch Inc.*, 259 F.3d 154, 177 (3d Cir. 2000) ("[F]ailure to show actual damages is a fatal defect in a Rule 10b-5 cause of action." (quoting *Feldman v. Pioneer Petroleum, Inc.*, 813 F.3d 296, 302 (10th Cir. 1987)); see also Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* vol. 2 § 13.7, 553 (3d ed., West 1995) ("Failure to allege or prove actual damages will result in dismissal of any 10b-5 damage claim.").

A public Rule 10b-5 claim requires more than just demonstrating an omission or misstatement of material fact. The most preliminary requirement is that of jurisdiction, in which the prosecution must demonstrate that the defendant "directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of an facility of any national securities exchange," engaged in a proscribed act in connection with the sale or purchase of a security. 17 C.F.R. § 240.10b-5 (2001) (emphasis added). Therefore, jurisdiction can be met by one of several means. The first, any means or instrumentality of interstate commerce, is quite broad and has included use of newspapers, radio broadcasts, telegraphs, teletypewriters and any mode of transportation is an "instrumentality of interstate commerce" if it crosses state lines when used. Arnold S. Jacobs, 5B *Disclosure & Remedies Under the Sec. Laws*, SECDRL § 8:2 (West: June 2002). The second means of jurisdiction, use of the mails, is similarly broad and has resulted in courts concluding that intrastate use of the mails is sufficient. *Id.* The third and final means to assert jurisdiction, any facility of any national securities exchange, allows jurisdiction when shown that a "facility" or "national securities exchange" have been used, as those terms are defined within the Act. *Id.* (citing 15 U.S.C. § 78(c)(a) (2000)).

D. Conspiracy To Commit Any Offense Against the United States

18 U.S.C. § 371 seeks to prohibit fraud by making it illegal to conspire to commit any offense against the United States or to defraud the United States.¹¹⁸ Such offenses against the United States often include mail, wire, and securities fraud, and therefore, lead to prosecutions under this section for conspiracy to commit any of these frauds. Section § 371, and the law of conspiracy in general, is intended to protect society from the dangers of concerted criminal activity, while also identifying an agreement to commit a crime that warrants criminal sanction regardless of whether the agreed upon crime occurs.¹¹⁹ To prove the crime of conspiracy under § 371, the government must establish (1) that the defendant agreed with at least one other person to commit an offense, such as mail, wire, or securities fraud; (2) that the defendant knowingly, or willingly, participated in the conspiracy with the specific intent to commit the offense that was the object of the conspiracy; and (3) that during the existence of the conspiracy, at least one or more members of the conspiracy committed at least one overt act in furtherance of the agreement.¹²⁰ The government need not prove that the defendant committed the substantive offense, but it must prove that the intended future conduct agreed upon included all the elements of the substantive crime.¹²¹

The conspiratorial agreement can be an informal tacit understanding¹²² and the government may use circumstantial evidence to demonstrate its existence as long as such evidence establishes beyond a reasonable doubt the defendant's knowledge of "the essential nature of the plan and [his or her] connection with it."¹²³ Violators are

118. 18 U.S.C. § 371 (2000). See generally *U.S. v. Wicker*, 80 F.3d 263, 267-68 (8th Cir. 1996) ("Section 371 prohibits two types of conspiracy: conspiracy 'to commit any offense against the United States' [such as mail fraud] and conspiring 'to defraud the United States.'").

119. *U.S. v. Feolo*, 420 U.S. 671 (1975).

120. See *U.S. v. Downing*, 297 F.3d 52, 57 (2d Cir. 2002) (specifying that at least one of the overt acts set forth in the indictment was committed by one or more members of the conspiracy); *U.S. v. Gebbie*, 294 F.3d 540 (3d Cir. 2002); *U.S. v. Edwards*, 188 F.3d 230 (4th Cir. 1999); *U.S. v. Peterson*, 244 F.3d 385 (5th Cir. 2001); *U.S. v. Sneed*, 63 F.3d 381 (5th Cir. 1995); *U.S. v. Gee*, 226 F.3d 885 (7th Cir. 2000); *U.S. v. Guerra*, 293 F.3d 1279 (11th Cir. 2002). The conspiracy is the gist of the crime; the function of the overt act is to show that the agreement has progressed into action. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959).

121. *U.S. v. Pinckney*, 85 F.3d 4 (2d Cir. 1996).

122. *U.S. v. Ellzey*, 874 F.2d 324 (6th Cir. 1989); *U.S. v. Murphy*, 957 F.2d 550 (8th Cir. 1992).

123. *Downing*, 297 F.3d at 57 (quoting *Blumenthal v. U.S.*, 332 U.S. 539, 557 (1947)). See generally *U.S. v. Amiel*, 95 F.3d 135, 144 (2d Cir. 1996); *U.S. v. Wicker*, 80 F.3d 263, 267 (8th Cir. 1996).

subject to up to \$10,000, imprisonment up to 5 years, or both, for each violation.¹²⁴

Each of the above federal statutes seeks to protect Americans from being defrauded out of services or investments. Public officials, private individuals and companies are prohibited from using schemes to introduce unfairness, deception, and immorality into their relationships with the American public.

III. Parallels Between Federal Fraud and International Figure Skating Judging and Officiating

When evaluated with the statutes above, it becomes evident that the improper activity prevalent in international figure skating judging and officiating is strikingly parallel to the behavior that Congress sought to prevent by passing the federal mail, wire and securities fraud statutes.

A. Mail Fraud and Wire Fraud

1. Honest Service Fraud

As discussed in Part I, the prohibition on honest services fraud punishes public officials for breaching a known duty, to achieve a personal benefit. Where a public official, such as those touched upon in *United States v. Frega* and *United States v. Lopez-Lukis*, owes a sacred duty to the public, international figure skating judges owe a duty to both the skaters and the public. ISU regulations require judges to “be, at all times, impartial and neutral.”¹²⁵ Furthermore, judges are required to “mark independently” and “are forbidden to use previously prepared marks.”¹²⁶ Rather, the “whole range of marks must be used according to the precise merit of the performance.”¹²⁷ Although judges owe these duties to the ISU, the rules are intended to ensure honesty and integrity when presiding over competitive skaters during international competitions, thereby having a direct impact on the skaters performing before the judges. Indeed, if judges did not owe such duty to the skaters, the IOC – along with the ISU’s support – would not have awarded Sale and Pelletier a duplicate Olympic gold

124. 18 U.S.C. § 371 (2000).

125. International Skating Union Special Regulations Ice Dancing 2000 Rule 590 (48th Congress, June 2000) at Rule 590. Rule 426 is the equivalent for international judging of pairs and singles skating.

126. *Id.*

127. *Id.*

medal in a stunning and immediate fashion. The governing bodies agreed that the judges and official harmed the skaters to the extent that a mere suspension would not have remedied the skaters' loss.

The duty owed to the public is less visible, but present nonetheless. ISU judges represent the member country from where they earned their international judging appointment. International judging is quite prestigious and requires many years of studying the sport and judging on the national level.¹²⁸ Even after completing these requirements and being elevated to subsequent judging levels, the odds suggest that a judge will not earn the appointment required to judge on the international level. In light of the selection process involved, many member countries have the opportunity to select their international judges from among extremely qualified and well known figure skating judges. The competitive selection process is intended to hand pick judges who will represent the member country, and its citizens, in the most professional manner. These judges are then expected to act as the country's public officials when judging an international skating event. After all, when the marks appear in the arena and on the television screen, the judges are not identified by number or name. Rather, each judge is identified by his or her member country – clearly indicating that he or she represents the citizens of that country.

The 2002 Olympic scandal, and earlier actions as well, demonstrate that judges are not the only people involved in fraudulent judging activity. Federation officials, such as Didier Gailhaguet, are often at the center of the improper actions. One could argue that skating officials, too, owe a duty to both skaters and the public. However, as discussed in Part I, a § 1346 violation does not require the defendant to owe a duty of honest services. Rather, as concluded in *United States v. Sawyer*, it is sufficient if a non public official engages in a scheme or artifice to deprive the citizens of their right to honest services,¹²⁹ each of whom owed a duty to do their jobs without deceit, fraud and dishonesty. Gailhaguet, who was found to have colluded to fix the results of the Olympic Pairs event,¹³⁰ clearly engaged in such scheme. First, by attempting to persuade Le Gougne to place the Russian pair ahead of the French pair and, thereby “fix” the event, Gailhaguet deprived the skaters of their right to honest judging. Furthermore, as discussed above, citizens of member countries

128. *Id.* at Rule 589.

129. *Supra* n. 42 at 713.

130. *See* Clarey, *supra* n. 10 and accompanying text.

are owed the honest services of judges who represent them and their country's skating organization.¹³¹ Indeed, Gailhaguet engaged in action to prevent French citizens from receiving Le Gougne's honest judging services.

In addition to breaching a duty to provide honest services, or engaging in a scheme to do so, honest services fraud involves obtaining a personal benefit. For example, in *United States v. Lopez-Lukis*, a lobbyist and member of the County Commissioner's Board, sought to assist her clients and, in turn, herself;¹³² in *United States v. Sawyer*, a insurance company's lobbyist sought to influence state legislative insurance members with intention to benefit his company and his individual career.¹³³ Likewise, international judges who engage in unethical judging often do so to improve, or even maintain, their judging careers. Marie Reine Le Gougne may have denied that Gailhaguet pressured her to place the Russian pair ahead of the Canadian pair, but fellow judges admit that had she been truthful as to this event, and if she had "attacked Gailhaguet," she would have been "finished as a judge."¹³⁴ In fact, when French judge Gilles Vandebroek went public with his refusal to fix events in the 1990s, he was expelled from the French federation.¹³⁵ Often, judges who participate in unethical judging do so to benefit their individual judging careers.

Other judges participate in judging fraud do so without feeling an attached threat to their judging careers. These judges participate to ensure that skaters from their member countries or regions succeed. It is well known that the Russians have dominated the Olympic pairs event; the controversial 2002 gold medal was their eleventh consecutive gold and they have enjoyed similar successes in international ice dancing events.¹³⁶ Many of the known improper judging activities, along with many speculated activities, have surrounded Russian and Eastern European judges who want to maintain this dominance. For example, a Ukrainian judge was caught explaining how skaters would finish before the 1998 Olympic ice dancing event took place. Also, Russian and Ukrainian judges were caught exchanging signals during

131. See *supra* nn. 23-26 and accompanying text.

132. *Supra* n. 32 at 1165-67.

133. *Supra* n. 42 at 713, 720-22.

134. See 60 Minutes, *supra* n. 20.

135. *Id.* at 12.

136. See CNN SI, 2002 Olympics, Newswire, *Figure Skating Under Review After Dirtiest Olympics*, available at <http://sportsillustrated.cnn.com/olympics/2002/news/02/23/AFP_TX_20020224_021400_OT89/index.html> (last accessed Feb. 23, 2002).

the pairs competition at the 1999 World Championships.¹³⁷ In addition, there have been numerous allegations throughout the years that Eastern European judges block-judge in order to place their skaters in the lead. Such allegations are now at the forefront of the resurfaced Salt Lake Scandal, where months later, the IOC continues to scrutinize the judging activity of up to six judges, most of whom appear to be Eastern European.¹³⁸ In these situations, judges do not feel threatened to act to improve or maintain their judging status. Rather, they engage in improper judging activity to ensure a personal benefit of controlling the dominance and victories within the sport.

Figure skating officials engage in fraudulent judging activity with goals as well. Like *Lopez-Lukis* where the defendant took bribes to assist her personal clients,¹³⁹ thereby bringing attention and achievement to herself, federation officials participate in schemes to defraud both skaters and the public in order to bring attention to their home countries and themselves. For example, had Gailhaguet “fixed” numerous skating events in favor of French skaters, he would have brought significant notoriety to the French Skating Federation, which he leads, and, therefore, to himself. Surely, if French skaters began to impede the Russian dominance in international ice dancing and pairs skating, Gailhaguet’s role as French Federation President would become increasingly comfortable and commendable.

2. *Essential Elements*

The discussion above uses the honest service fraud theory to demonstrate the similar behavior involved in figure skating judging and officiating, thereby suggesting that a federal law should address this behavior when it takes place on United States territory. The purpose is not to argue that Gailhaguet, Le Gougne or any other skating judge or official committed mail fraud or wire fraud during the 2002 Olympics or at any prior skating event. Nonetheless, the similarity in behavior is exacerbated when evaluating the essential elements of a mail fraud and wire fraud charge in connection with some of the relevant international figure skating events.

Both statutes require the government to show that the accused

137. See 60 Minutes, *supra* n. 20.

138. See ESPN, *Olympic Sports, Police Say Alleged Olympic Fix May Spread* <<http://espn.go.com/oly/news/2002/0801/1412716.html>> (Aug. 1, 2002). In fact, Yuki Balkov, the Ukrainian judge suspended for one year after voting improprieties in the 1998 Olympics, is now one of the judges under suspicion. See ESPN, *supra* n. 9.

139. *Supra* n. 32 at 1164.

intentionally participated in a scheme or artifice to defraud.¹⁴⁰ To meet this element, the government must show some degree of planning by the perpetrator.¹⁴¹ With respect to the Salt Lake Scandal, Le Gougne confessed to other Olympic judges that she “made a deal” with unspecified Russian judges in which she would place the Russian pair team in first place in return for them placing the French ice dance team in first place.¹⁴² Taking this allegation as true,¹⁴³ Le Gougne engaged in planning to do this. Furthermore, Gailhaguet also partook in the planning when he allegedly pressured Le Gougne to participate in this “deal,” or at a minimum to place the Russians in the lead despite the quality of their performance. Judges of past events have conducted planning when they called each other to discuss the outcome of future events;¹⁴⁴ and when they have signaled to each other how they intend to score performances.¹⁴⁵ Perhaps the most obvious planning took place in the 1990s when Gailhaguet sent a letter to French judges encouraging them to discuss a “conquering strategy for France.”¹⁴⁶ In rare instances, a defendant is successful in arguing that he lacked any knowledge of the false or misleading nature of the scheme or that he was not privy to any part of the scheme, which others lead.¹⁴⁷ In the numerous schemes involving figure skating judges and officials, however, their planning has demonstrated both involvement and intent.¹⁴⁸

Both statutes also require the government to show that the defendant acted with specific intent to defraud.¹⁴⁹ Showing specific intent is more demanding, but still satisfied when evaluating actions of international skating judges and officials. Unlike general intent, which requires only the “intention to make the bodily movement which constitutes the act which the crime requires,”¹⁵⁰ specific intent to defraud requires the government to use the facts and circumstances

140. 18 U.S.C §§ 1341, 1343 (2000).

141. See *DeMier*, 616 F.2d at 369.

142. See *CNNSI*, *supra* n. 2.

143. The ISU did not investigate this allegation. The complaint filed against Tokhtakhounov indicates that more than one judge was involved in the alleged fixing of the pairs and ice dancing events. See *ESPN*, *supra* n. 14, at Counts 1 and 2.

144. See *Clarey*, *supra* n. 18.

145. *Id.*; see *Sullivan*, *supra* n. 19.

146. See *60 Minutes*, *supra* n. 20.

147. See *U.S. v. Pearlstein*, 576 F.2d 531, 538-43 (3d Cir. 1978).

148. See Introduction for discussion regarding how judges and officials contact other judges in attempt to plan ways to fix international figure skating events.

149. 18 U.S.C. §§ 1341, 1343.

150. Wayne R. LaFave, *Criminal Law* § 3.5, 239 (3d ed., West 2000) (quoted by *State v. James*, 560 A.2d 426, 443 (1989)).

to show the scheme was “reasonably calculated to deceive persons of ordinary prudence and comprehension.”¹⁵¹ Although there could be significant disagreement as to whether any judge or official acts with intent to defraud the public of their right to honest judging and officiating, it is more clear that those involved intend to defraud certain skaters in favor of other skaters. The facts and circumstances involved show that in order to place the Russian pair team ahead of the Canadian team – regardless of performance – Le Gougne and Gailhaguet implicitly intended to defraud Canadians Sale and Pelletier.

Likewise, judges adhering to Gailhaguet’s instructions in the 1990s acted with intent to favor French skaters, while simultaneously intending to punish non-French skaters. Finally, when judges routinely block judge by placing certain geographical ice dancing teams ahead of others, they intend to favor teams from specific countries, while also intending to defraud teams from other regions. Not only have judges and officials acted with intent to deceive persons of ordinary prudence and comprehension,¹⁵² but their activity rises to a higher level and meets the level of intent to defraud specified skaters – the exact people they intended to defraud all along.¹⁵³

Aside from mental state, both the mail and wire fraud statutes have jurisdictional elements. Mail fraud, of course, requires use of

151. *U.S. v. Plache*, 913 F.2d 1375, 1381 (9th Cir. 1990) (quoting *U.S. v. Green*, 745 P.2d 1205, 1207 (9th Cir. 1984)).

152. See *supra* n. 63 and accompanying text.

153. See *supra* Part I(A)(3). See also *U.S. v. Castro*, 89 F.3d 1443, 1455 (11th Cir. 1996) (finding specific intent when defendants intended to defraud the state of Florida of honest services); *U.S. v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995) (finding specific intent when defendant specifically intended to commit a fraud on Atlanta’s citizens). With respect to the Salt Lake Scandal, one may assert that Le Gougne did not act with the requisite mental state, but rather acted under a state of duress. Although Le Gougne changed her story and now maintains that she judged based on her own intuition only, if prosecuted, she could likely revert to her earlier story in which she alleged that Gailhaguet pressured her to place the Russian pair team ahead of the Canadian pair team at the 2002 Salt Lake City Olympics. She would further allege the same argument offered by fellow French judges – had she not abided by Gailhaguet’s orders, she would have destroyed her judging career. The requirements of the duress defense in criminal prosecutions are well established. The duress must be “present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done.” Donald M. Zupanec, *Coercion, Compulsion, or Duress as Defense to Charge of Robbery, Larceny or Related Crime*, 1 A.L.R.4th 481 § 2 (1980). Furthermore, the threat to ruin a defendant’s reputation does not meet the required standard. See *id.* at § 5; *Hamilton v. State*, 184 N.E. 170 (Ind. 1933) (no duress where defendant contended that he took part in a burglary after threats were made to ruin his reputation). Indeed, even if Le Gougne feared a threat from Gailhaguet, nothing suggests that she was ever in any type of physical harm and certainly nothing of which was present, imminent, and impending. In sum, any suggestion that she Le Gougne acted under duress is without merit.

the United States Postal Service or a private or commercial interstate carrier¹⁵⁴ and wire fraud requires interstate use of the wires to meet Commerce Clause grounds.¹⁵⁵ Both means must be used to execute the fraudulent scheme, thereby rendering it “incident to an essential part of the scheme.”¹⁵⁶ Interestingly, skating judges and officials have come close to meeting these jurisdictional requirements when engaging in examples of fraudulent judging activity. Just before the 1994 Olympics, Gailhaguet sent a letter to all French judges encouraging them to work towards “conquering a strategy for France.”¹⁵⁷ Although it is evident that the French Federation President did not use the United States Post Office for this venture, he certainly did use the mail to assist with the execution of his scheme; that is to fix international skating events in the French skaters’ favor.

Likewise, during the 1998 Winter Olympics in Nagano, Japan, a Canadian judge tape-recorded a Ukrainian judge’s phone call to her in which he explained the results of the upcoming ice dancing competition.¹⁵⁸ Although the phone call was made between two parts of Japan, thereby failing to meet the interstate or foreign commerce requirement,¹⁵⁹ he, too, used the wires to assist with the execution of his scheme to defraud the skaters and public alike. Indeed, when analyzed against the honest services theory of the mail and wire fraud statutes, it becomes increasingly evident that United States federal law seeks to prevent and punish the types of fraudulent judging and officiating prevalent in international figure skating.

B. Securities Fraud

The fraudulent activity Congress intended to regulate by passing the Securities Act of 1934 is present, and more prevalent, in international figure skating judging and officiating. Congress passed the Act

154. *See supra* n. 28.

155. *See supra* n. 68.

156. *See supra* n. 59.

157. *See supra* n. 20.

158. *See supra* n. 18.

159. *See supra* n. 67. However, courts have found that transmissions between two parts of a foreign country satisfies the “foreign commerce” requirement under 18 U.S.C. § 2314, which prohibits transportation in interstate or foreign commerce of any goods, wares, merchandise, securities or money, of the value of \$5000 or more, knowing the same to have been stolen, converted, or taken by fraud. In doing so, courts have concluded that if the acts committed outside of the United States are intended to have an effect in the United States, jurisdiction is proper in the United States. *See U.S. v. Goldberg*, 830 F.2d 459, 463 (3d Cir. 1987) (“There would seem to be no logical reason for holding that Congress intended to punish those who cause the violation of a law regulating and protecting foreign commerce only when they act within the borders of the United States.”).

to prevent unfair practices and to ensure fairness in the securities industry and the SEC promulgated Rule 10b-5 to prohibit fraud in the sale and purchase of securities.¹⁶⁰ Of course, there is no sale or purchase of securities involved in international figure skating. However, thousands of spectators purchase tickets for every international figure skating event. In the 2002 Winter Olympics, for example, figure skating was one of the most popular events. Even after the scandal-ridden pair skating event began, spectators were willing to buy a ticket for \$500 – approximately \$300 over value.¹⁶¹ Another potential spectator bid \$11,100 for a pair of tickets to a men's Olympic skating event.¹⁶² Tickets for one of the most popular events, women's figure skating, held a face value of \$375 per ticket.¹⁶³ Just as individuals and corporations are prohibited from defrauding purchasers and sellers of securities, figure skating judges and officials should be prohibited from defrauding purchasers of costly tickets to international figure skating events.

It is rather odd to discuss parallels when there does not exist a purchase or sale of securities, but only the sale of tickets. Furthermore, it is clear that the ticket sellers are not the same people as the judges and officials perpetrating fraud on the public. The ticket sellers, who are engaged in a separate process are inextricably intertwined with the judging and officiating process and are, therefore, innocently involved in the fraud perpetrated on the public. Nonetheless, the purpose of using the securities fraud statute in this context is to demonstrate parallels between two types of fraudulent behavior and is not meant to prove the elements of a Rule 10b-5 violation.¹⁶⁴

160. See *supra* nn. 76-77.

161. Chris Isidore, *Not a Ticket to Profits*, available at <http://money.cnn.com/2002/02/14/olympics/olympics_tickets> (Feb. 14, 2002).

162. About, *Skiing, Got Salt? Lake City Tickets, That Is; Official Auction at eBay a Success*, available at <<http://skiing.about.com/library/weekly/aa060201a.htm>> (June 2, 2001).

163. Bill Redeker, *Olympic-Sized Price War*, available at <http://abcnews.go.com/sections/business/WorldnewsTonight/olympics_economy020123.htm> (Jan. 23, 2002).

164. Just as use of interstate commerce is present in securities fraud, it, too, is present in the purchase and sale of international figure skating tickets. See *supra* n. 116. Many ticket purchase transactions begin with a telephone call. In 1975, Congress added to the term interstate commerce to include the use of a telephone or other interstate means of communication. See Jacobs, *supra* n. 117 (citing 15 U.S.C. § 78(c)(a)(17) (1997)). Since then, courts have concluded that even an intrastate call satisfies the standard. See *id.* (A mailing between two locations within the same state is sufficient.) Other ticket sale transactions that begin with a fax or internet transaction, may also satisfy the "other interstate means of communication," but clearly satisfy the "use of the mails" method of meeting the jurisdictional requirement. Nearly all such transactions complete with the seller using the

1. *Material Omission in Sale*

Assuming the same fairness and anti-fraud concerns apply to the sale of prestigious figure skating tickets as do to the purchase and sale of securities, a discussion of materiality is warranted to evaluate the fairness, or lack of such, involved. As discussed in Part I, companies are required to release information if there is a “substantial likelihood that a reasonable investor would consider it important in making a decision to buy or sell a security”¹⁶⁵ and such that the omitted fact would have significantly “altered the ‘total mix’ of information made available.”¹⁶⁶ There is no denying that neither the judges, officials, French Federation, nor the IOC released any information prior to the 2002 Olympic pairs event regarding fraudulent judging and officiating activity. Likewise, the same holds true for any other allegedly “fixed” or fraud filled figure skating event in the past. Scrutinizing the clear omission at the 2002 pairs event, the question for materiality becomes whether a reasonable ticket purchaser would have viewed the omission as significantly altering the total mix of information made available to the buyer when purchasing tickets.¹⁶⁷

Indeed, the withheld information at issue was not “trivial,” or “so basic that any” ticket purchaser “could be expected to know it.”¹⁶⁸ It is likely that many of the thousands of live spectators would still have purchased tickets to watch the event even knowing judges and officials were knowingly engaged in a scheme to defraud specific skaters and the public alike.¹⁶⁹ For these spectators, the opportunity to watch

mail to deliver the tickets to the purchaser. In fact, 2002 Olympic ticket sellers used the mail to distribute to purchasers just miles away in Utah and to those purchasers abroad. Intrastate, interstate, and foreign use of the mails satisfy the second method to meet jurisdiction – use of the mails. *See id.* In order to have the ability to track items sent and to ensure timely delivery, many ticket providers choose to use private carriers when sending tickets to purchasers. *See* <<http://www.mountainwesttravel.com/tickets.htm>> (accessed July 12, 2002). In 1994, Congress expanded the mail fraud statute to cover private interstate commercial carriers such as Federal Express and the like. 18 U.S.C. § 1341 (1994); *See* SCAMS Act, Pub. L. No. 103-322, Title XXV, § 250006, 108 Stat. 1796, 2087 (1994). While Congress has not included a similar provision in § 10b of the 1934 Act, it is well known that the jurisdictional requirements of Rule 10b-5 should be construed broadly to effectuate the purposes of the Act. *See* Jacobs, *supra* n. 117, at n. 6. Furthermore, the jurisdictional element of the Rule is said to be at least as broad as that of the mail fraud statute, thereby suggesting that use of private mail carriers would satisfy the “use of the mails” requirement under Rule 10b-5. *See id.*

165. *Basic v. Levinson*, 485 U.S. at 232.

166. *Id.* at 232.

167. For materiality standard, see *supra* notes 88-102 and accompanying text.

168. For standard confirming non-materiality, see *supra* notes 98-99 and accompanying text.

169. Although there is speculation that up to six judges were involved in the Salt Lake

the Olympic performance—and not the judges opinions or skaters’ placement—was the motivation to purchase tickets. Others, however, may have been more interested in the scoring and outcome of the event. This is, of course, true at an Olympic event when spectators and the press maintain a daily country medal count. For spectators in this category, it is possible that they would not have purchased tickets had they been aware that the event would be permeated with judging and officiating fraud that would moot the original results and question the revised outcome six months later.¹⁷⁰

2. *Other Essential Elements of Securities Fraud*

As indicated in Part I, the scienter requirement for fraud in connection with the sale or purchase of securities requires the government to prove that the defendant acted willfully.¹⁷¹ Although courts are not uniform in their application of this requirement, most courts conclude that at minimum, defendants must have intended to do a wrongful act, but need not have intended to violate the law.¹⁷² The ISU concluded that Gailhaguet and Le Gougne schemed to place the Russian pair team ahead of the Canadians regardless of the quality of the performances.¹⁷³ It is also well known that other international skating events involve block judging, where groups of judges predetermine the outcome prior to the competition.¹⁷⁴ Others judges simply attempt to discuss results before the events take place or signal to each other during events.¹⁷⁵ Each internationally appointed judge involved in such behavior knows that he or she is required to “be, at all times, impartial and neutral,”¹⁷⁶ to “mark independently”¹⁷⁷ and may not, at any time, “use previously prepared marks.”¹⁷⁸ Indeed, the Salt Lake Scandal and other figure skating scandals that proceeded 2002 have involved judges who intended to engage in wrongful acts.

Scandal, it remains unclear as to how many from each of the two relevant events were involved.

170. The materiality standard does not require that the purchaser would have acted differently had an accurate disclosure been made. At minimum, however, it is likely that the reasonable ticket purchaser would have viewed the withheld information as significant when making his or her decision to purchase tickets for the 2002 Olympic events and other international figure skating competitions.

171. See *supra* nn. 108-109 and accompanying text.

172. See *supra* nn. 110-113 and accompanying text.

173. See *supra* n. 7.

174. See *supra* n. 23.

175. See *supra* n. 19.

176. See *supra* n. 125.

177. See *supra* n. 125.

178. See *supra* n. 125.

As discussed above, in *Affiliated Ute Citizens v. U.S.*, the court concluded that reliance is not necessary when material information is not disclosed at all.¹⁷⁹ Therefore, where no official or regulatory body disclosed the potential fraud that would occur in an international skating event, the prosecuting authority would not need to demonstrate reliance. Nonetheless, the prosecuting authority would need to prove loss causation, which means that but for the defendant's wrongdoing, the plaintiff would not have incurred the harm about which he or she complains.¹⁸⁰ Therefore, assuming that ticket purchasers were defrauded of the value of their tickets, a prosecutor would be required to demonstrate that absent the judge's or official's failure to disclose that he or she would be engaging in fraud with respect to a specified international figure skating event, the ticket purchasers would not have incurred the economic harm. In doing so, the prosecution would need to establish that the ticket purchasers did, in fact, suffer economic damages.¹⁸¹

C. Conspiracy to Commit Federal Fraud

18 U.S.C. § 371 allows authorities to prosecute international figure skating judges and officials who conspire to commit any of the above federal crimes while presiding over an event hosted in the United States. The conspiracy statute could be useful in situations, such as judging and officiating activity, where one person acts with at least one other person to commit a federal crime. In each case of known judging or officiating fraud, the activity involves multiple actors. For example, one judge calls another to elaborate on the outcome of an event before it takes place; a federation leader writes a letter persuading his judges to develop a strategy to benefit his country's skaters; or a federation leader pressures a judge to place a particular team ahead. These types of phone calls and letters may satisfy the requirement that one member of the conspiracy commit at least one overt act in furtherance of the agreement.¹⁸² In fact, the federal indictment charging Tokhtakhounov with violating § 371 by conspiring to commit wire fraud alleges that the overt acts consist of Tokhtakhounov engaging in telephone conversations with unnamed co-

179. 406 U.S. at 153; *see also supra* n. 115.

180. *See supra* n. 116.

181. *See supra* n. 117.

182. *See e.g. U.S. v. Aloï*, 511 F.2d 585 (2d Cir. 1975) (phone call to co-conspirator to advise that they obtained approval for stock swindler's participation in securities fraud met overt act requirement).

conspirators about the results of Olympic pairs figure skating event.¹⁸³ A federal law criminalizing fraudulent judging and officiating activity would broaden the use of 18 U.S.C. § 371 and allow for federal conspiracy charges in situations where judges' behavior parallels the behavior prohibited by federal fraud statutes, but do not involve the same means or methods contemplated by those statutes.¹⁸⁴

An analysis comparing the actions prohibited by the federal mail, wire and securities fraud statutes with the actions committed by international figure skating judges and officials during, and prior to, the 2002 Olympics demonstrates the similarities between such fraudulent behavior. Just as Congress sought to prohibit fraud conducted via mail, wire or through the sale and purchase of securities, Congress must prohibit fraud conducted in the international figure skating arena.

IV. Proposed Law

Congress must prevent fraudulent activity in the international figure skating arena. It should be, therefore, a criminal activity for any person¹⁸⁵ who moves in, or affects, interstate or foreign commerce to knowingly engage in any fraudulent activity, or attempt to know-

183. See Sealed Complaint, *U.S. v. Tokhtakhounov*, filed July 22, 2002, Southern District of New York, Count 1 at ¶3(a) and (b). <<http://news.findlaw.com/cnn/docs/olympics/tokhtakhounov72202cmp.pdf>> (accessed Nov. 13, 2002). Tokhtakhounov was also charged with conspiring "to carry into effect a scheme in commerce to influence by bribery a sporting contest" in violation of 18 U.S.C. § 224. *Id.* at Count 2, ¶4. 18 U.S.C. § 224 reads: "Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined under this title, or imprisoned not more than 5 years, or both." 18 U.S.C. § 224 (2002). The allegations and news information suggest that Tokhtakhounov used his connections to see that the French ice dancing team would win the gold medal in exchange for a visa to return to France, where he once lived. See *Pairs Fix? Alleged Mobster Arrested*, <<http://www.nsnbc.com/news/788125.asp?pne=msn>> (July 31, 2002). This type of exchange or bribery—the essence of 18 U.S.C. § 224—is not present in situations involving judges and officials. Judges often attempt to place certain skaters ahead of others to benefit the skaters from their countries or regions. As discussed in the Introduction and throughout, judges allegedly vote in blocks, predetermining how they will judge and therefore try to determine the outcome of an event. They signal to one another how they will vote before recording their scores. Federation officials have allegedly sought to influence their judges. While judges may feel threatened to vote a specific way in order to keep their judging positions, as of yet there are no concrete examples of bribery involved.

184. For example, judging improprieties such as block judging, signaling to fellow judges during an event, and determining the outcome of an event before it takes place do not fall under mail fraud or wire fraud if the activity does not involve any plan to use the mails or wires to conduct the fraud.

185. A person is defined here to mean any natural person.

ingly engage in any fraudulent activity, that may affect the scoring of any skater or team of skaters or the outcome of any international skating event,¹⁸⁶ when such international figure skating event takes place in the United States. A violator shall be fined up to \$50,000, imprisoned not more than three years, or both.

A. Jurisdiction

Congress has power to create such law pursuant to the Commerce Clause. The Constitution grants Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with Indian tribes.”¹⁸⁷ In *Gibbons v. Ogden*,¹⁸⁸ the Supreme Court first discussed the scope of the Commerce Clause by concluding that it is within congressional power to regulate commercial intercourse between the states;¹⁸⁹ as such, Congress can prescribe rules governing commerce, and this power may be exercised to the utmost extent.¹⁹⁰

1. Articles of Commerce

The Court quickly concluded that Congress had power to regulate articles or commodities of commerce.¹⁹¹ For example, in *Champion v. Ames*, the Court concluded that pursuant to its Commerce Clause power, Congress may criminalize the interstate transportation of lottery tickets.¹⁹² In doing so, the court concluded that Congress was permitted to pass a law having the effect of keeping the channels of commerce free from use of tickets used in promotion of lottery schemes. Soon after, in *Hipolite Egg Co. v. U.S.*, the Court sustained Congress’ power to pass the Pure Food and Drug Act, which prohibited interstate transport of impure food and drugs.¹⁹³ In *Clark Distilling Co. v. Western Maryland Railway Co.*, the Court acted similarly when it sustained Congress’ authority to criminalize the transportation of liquor in interstate commerce.¹⁹⁴ Commerce, which consisted of intercourse and traffic, was not limited to property and commodi-

186. An international figure skating event is defined here to mean any skating event that is part of a competition sanctioned by the International Skating Union.

187. U.S. Const. Art. I, § 8, cl. 3.

188. 22 U.S. 1 (1824).

189. *Id.* at 194-196.

190. *Id.* at 196.

191. See *Hammer v. Dagenhart*, 247 U.S. 251, 270 (1918), *overruled in part*, *U.S. v. Darby*, 312 U.S. 100 (1941).

192. 188 U.S. 321 (1903).

193. 220 U.S. 45, 60 (1911).

194. 242 U.S. 311, 331 (1917).

ties. The transportation of persons was clearly included in such a definition.¹⁹⁵ In *Hoke v. U.S.*, the Court sustained Congress authority to prohibit the interstate transportation of a woman for the purpose of prostitution.¹⁹⁶ In *Caminetti v. U.S.*, the Court sustained Congress' Commerce Clause power to prohibit the transportation of women in interstate commerce for purposes of "debauchery and kindred purposes."¹⁹⁷

Simultaneously, the Court emphasized that through use of the Commerce Clause, Congress could legislate to protect public morals and welfare. When upholding the right to criminalize interstate transportation of lottery tickets in *Champion v. Ames*, the Court reasoned that Congress may act to protect public morals by guarding against the "pestilence of lotteries."¹⁹⁸ Likewise, in *Hoke v. U.S.*, the Court noted the national government's role in promoting the general welfare and morals when sustaining a law criminalizing the interstate transportation of women and girls for immoral purposes.¹⁹⁹

Under this theory, Congress has the power to criminalize persons who move in interstate or foreign commerce and, thereafter, engage in fraudulent figure skating judging or officiating activity. In each of the cases discussed above, the use of interstate transportation was necessary to the accomplishment of the harmful or immoral result; thereby allowing Congress to use the Commerce Clause to regulate the harmful goods or persons.²⁰⁰ Similarly, Congress can act to regulate the harmful persons who are moving in interstate or foreign commerce and will, later, engage in fraudulent activity when presiding over international figure skating events. In doing so, Congress will act as it did in *Champion v. Ames*, by passing a law having the effect of keeping the channels of commerce free from persons who will later engage in fraudulent activity with respect to international skating events.

Congress' ability to legislate to protect public morals and welfare provides additional support for a law criminalizing persons who travel in interstate or foreign commerce and who, thereafter, engage in fraudulent judging or officiating. This fraudulent activity diminishes

195. See *Champion v. Ames*, 188 U.S. 321, 351-2 (1903) (citing *Western U. Telg. Co. v. Pendleton*, 122 U.S. 347, 256 (1887) (recognizing that commerce with foreign countries and among the states which Congress could regulate included "carriage of persons").

196. 227 U.S. 308 (1913).

197. 242 U.S. 470 (1917).

198. 188 U.S. at 357.

199. *Hoke*, *supra* n. 196 at 321.

200. See *cf. Hammer*, 247 U.S. at 272.

the value of the spectators' costly tickets, souvenir sales, media coverage and advertising, along with impeding the public's ability to receive the entertainment value they expect from international figure skating competitions. The suggested legislation seeks to protect the spectators and commercial persons involved in international figure skating events from being subjected to such hardship.

In *Hammer v. Dagenhart*, the Court evaluated whether the Commerce Clause allowed Congress to prohibit the transportation of factory manufactured goods when children under the age of sixteen had been employed or permitted to work on such goods more than eight hours a day or more than six days per week.²⁰¹ It concluded that Congress did not have such power. The Court emphasized that the Act aimed to standardize the ages at which children may be employed in manufacturing within the states.²⁰² The goods shipped in commerce were harmless; it was the child labor regulations that were at the heart of the statute and Congress' motive.²⁰³ With respect to the proposed law, however, the persons in commerce, and their actions thereafter, are at the heart of the statute. The statute seeks to prevent such persons from traveling in commerce and, thereafter, engaging in fraudulent activity pertaining to international figure skating events. Although the regulation does not focus solely on regulating the persons from moving in commerce, the effect of that activity combines with their transportation to form the heart of the statute.

In *U.S. v. Darby*,²⁰⁴ the Court upheld Congress' ability to regulate in the way suggested by the proposed law. The Court sought to determine whether Congress had the power to prohibit shipment in interstate commerce of lumber manufactured by employees whose salaries and wages did not meet the minimum standards set forth in the Fair Labor Standards Act.²⁰⁵ The Court admitted that although the prohibition was "nominally a regulation of the commerce,"²⁰⁶ its motive was a "regulation of wages and hours of persons engaged in manufacture"²⁰⁷ "under the guise of a regulation of interstate commerce."²⁰⁸ Nonetheless, the Court confirmed that such regulation was not forbidden. Rather, regardless of motive and purpose, which are

201. 247 U.S. 251 (1918).

202. *Id.* at 272.

203. *Id.* at 272-73.

204. 312 U.S. 100 (1941).

205. *Id.* at 112.

206. *Id.* at 113.

207. *Id.* at 113.

208. *Id.* at 114.

left to the legislature and not the courts²⁰⁹, regulations of commerce that “do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.”²¹⁰ Thereafter, the Court upheld the regulation.²¹¹

Thus, despite any suggestion that the regulation at issue is not intended to regulate the travel of judges and officials in interstate commerce, but is rather meant to regulate their behavior that follows, the regulation remains permissible under Congress’ Commerce Clause provided that it does not conflict with a separate Constitutional provision. Even if the heart of the regulation extends beyond transportation of judges and officials in interstate commerce, the regulation meets muster under *Darby* and the articles of commerce theory.

Both *Hammer* and *Darby* did emphasize, however, that Congress’ power does not extend to a purely local activity left for states to control.²¹² In *Hammer*, the Court determined that Congress was not permitted to deny transportation to states engaging in business where the hours of labor and the rates of compensation were not to Congress’ satisfaction. The Court concluded that the Commerce Clause was not intended to give Congress “general authority to equalize such conditions,”²¹³ nor was it intended to allow Congress authority to control states in their exercise over local trade and manufacture.²¹⁴ In sum, Congress did not have the power to control the hours of labor in factories and mines within the states, a matter “purely local in character.”²¹⁵ In *Darby*, the Court expanded on this by emphasizing that states controlled local, or intrastate, activities, unless such activities affect interstate commerce.²¹⁶

In contrast, the proposed law does not regulate a local matter. International figure skating judging and officiating is inevitably inter-

209. *Id.* at 115.

210. *Id.*

211. *Id.*

212. *See Hammer*, 247 U.S. at 276; *Darby*, 312 U.S. at 118-19.

213. *Hammer*, 247 U.S. at 273.

214. *Id.*

215. *Id.* at 276.

216. 312 U.S. at 119 and n. 3. *See also Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453 (1938). The standard regarding “affect on interstate commerce” has become more stringent through the years requiring that the activity “affect” or “substantially affect” interstate commerce in order to be within Congress’ Commerce Clause power. *See Preseault v. ICC*, 494 U.S. 1, 17 (1990); *c.f. Maryland v. Wirtz*, 329 U.S. 183, 196 n. 27 (1968). In *U.S. v. Lopez*, the Court concluded that based on the “great weight of case law,” the proper test requires “an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.” 514 U.S. 549, 559 (1995)

twined with national and international federations. For example, the 2002 Winter Olympic figure skating events included judges and federations from around the world, all of whom are members of the ISU. In fact, as of 2000, 56 skating associations and federations were members of the ISU,²¹⁷ each holding a potential opportunity to place one member to judge an international skating event. Involvement extends beyond the nine judges and one official for each event, including the competitive skaters from these countries. An international single skating event can include over twenty skaters, usually consisting of no more than three skaters from the same country. Indeed, even without scrutinizing the spectators, media coverage, advertising, and souvenirs pertaining to an international skating event, it is evident that such event is in dark contrast to a local activity such as state labor laws. In fact, one need only watch a few minutes of the opening ceremony of any Olympics to conclude that there is nothing more of a universal or non-local activity than the Olympic Games.

2. *Intrastate Activity That Substantially Affects Interstate or Foreign Commerce*

Even assuming that international figure skating judging and officiating is deemed a local event, such activity substantially affects interstate commerce to the level of allowing Congress to regulate pursuant to the Commerce Clause. In the 1995 case, *U.S. v. Lopez*, the Court emphasized that “where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”²¹⁸ When describing such regulation, the Court elaborated on *Wickard v. Filburn*, which involved an act to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses, shortages and fluctuation in wheat prices.²¹⁹ The Court sustained the Act, as applied to an Ohio farmer who harvested about 12 acres more wheat than his allotment under the Act permitted.²²⁰ The Court emphasized that in the aggregate home-consumed wheat would have a substantial influence on price and market conditions because of the potential that it could “overhang the market and, if induced by rising prices, . . . flow into the market and check price increases.”²²¹

The *Lopez* Court distinguished the regulation before it, where the Congress sought to make it a criminal offense for any individual

217. See *supra* n. 125, at 231-32.

218. 514 U.S. at 560.

219. *Id.*

220. *Id.* (quoting 317 U.S. 111, 128 (1942)).

221. *Id.*

knowingly to possess a firearm in a school zone, from that in *Wickard*.²²² Unlike the agricultural regulation in *Wickard*, the *Lopez* regulation prohibiting guns in school zones had “nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms”;²²³ neither the actors nor their conduct had a commercial character, and neither the purposes nor the design of the statute had a commercial nexus.²²⁴ The Court rejected the government’s “inference upon inference”²²⁵ that possession of a firearm in a school zone may result in violent crime, which may affect the national economy by spreading the cost of violent crime through the population and reducing the likelihood of travel to crime ridden areas.²²⁶ In sum, the Court emphasized that the Commerce Clause allows regulations of activities that arise out of, or are connected with, commercial transactions that substantially affect interstate commerce and that possessing a gun in a school zone was not such an activity.²²⁷

When evaluating figure skating judging and officiating with a holistic approach, the commercial nexus flourishes. Judging and officiating is one part of an elaborate international skating event. Therefore, it is necessary to evaluate the activity by considering what precedes and follows. International figure skating events are fruitful commercial enterprises. The 2003 World Figure Skating Championships in Washington, D.C. attracted over 200,000 spectators and 194 competitors from 41 nations, an estimated economic impact of over \$30 million.²²⁸ Visitors to the 2001 World Figure Skating Championship in Vancouver, British Columbia were expected to contribute an estimated \$14.8 million in direct spending to the local economy.²²⁹ The competition, which consisted of over 220 skaters from nearly 50 countries, attracted visitors from around the world.²³⁰ In fact, tourism directors confirmed that having the international figure skating com-

222. *Id.* at 551.

223. *Id.* at 561.

224. *Id.* at 580.

225. *Id.* at 567.

226. *Id.* at 563.

227. *Id.* at 561.

228. See *Washington Will Be Focus of Figure Skating World in 2003*, available at <<http://www.usfsa.org/worlds02/html>> (accessed Mar. 24, 2003); *2003 Worlds Figure Skating Championships to Host 194 Competitors From 41 Countries*, available at <<http://www.2003worlds.com/story.html>> (accessed Mar. 24, 2003).

229. See Tourism Vancouver, *World Figure Skating Event Enriching Local Coffers*, available at <http://www.tourismvancouver.com/docs/media/news_release_0317.htm> (Mar. 16, 2001).

230. *Id.*

petition was like have a major convention in the city: restaurants were busy, city attractions were crowded, and transportation companies were working to accommodate spectators.²³¹ Local figure skating events, which also involve a flurry of interstate travel of skaters, judges, officials and spectators, are clearly connected with commercial activity. The 2000 United States National Figure Skating Championships attracted thousands of out-of-town visitors and contributed \$17.9 million to the economy of the city of Cleveland.²³²

The commercial activity surrounding an Olympic event is even more apparent. The Salt Lake City games resulted in \$4.8 billion in economic output; \$76 million in net revenue to Utah's government; 35,000 job-years of employment; \$1.5 billion of labor income for Utahans; and a net increase of 50,000 visitors to Utah per day during the Games.²³³ For the private sector, NBC paid \$545 million for the rights to air the Salt Lake Games and data suggests that the network and its parent company General Electric made \$75 million in profits.²³⁴ Approximately 64 corporate sponsors spent \$860 million to associate their brand names with the Salt Lake Games. Well known companies including McDonald's, Visa and Coca-Cola paid for perks and access to Olympic advertising and on-site product placements.²³⁵ Of course, the ultimate commercial connection associated with judging or officiating an Olympic figure skating event is the economic rewards that follow the gold medal award. When Peggy Fleming and Dorothy Hamill won gold medals, they could expect a few lucrative endorsement offers.²³⁶ Now, however, corporate America flockes to gold medalists in large numbers, making the gold worth \$10 million over a lifetime to the woman who wins the singles event.²³⁷ It is now common for skaters to move from the podium straight to the Wheaties cereal

231. *Id.*

232. See Carol A. Lucas, *On The Job; Terry Hebert, chairman of the board for the Convention & Visitors Bureau of Greater Cleveland, has an eye on attracting tourists*, Crain's Cleveland Business (October 9, 2000) 28;

233. *Governor's Olympic F.Y.I.*, available at <http://www.utah.gov/olympicfyi/previous_02_21_02.html> (Feb. 21, 2002).

234. Ronald Grover, *NBC's Big Bet on the Olympics*, available at <http://www.businessweek.com/bwdaily/dnflash/feb2002/nf2002028_6074.htm> (Feb. 8, 2002).

235. Roland Jones, *Banking on an Olympic Boost* <<http://www.msnbc.com/news/713868.asp>> (Feb. 22, 2002).

236. Mark Lund & Susan Wessling, *The Value of Gold: What is An Olympic Medal Worth?*, International Figure Skating <<http://www.ifsmagazine.com/feature6.html>> (accessed June 23, 2002).

237. Christine Brennan, *Kerrigan, Harding: Now the Rest of the Story* <http://www.washingtonpost.com/wpshr/sports/longterm/olympics1998/history/timeline/art.../time_02279b.htm> (Feb. 27, 1994).

box, and the corporate headquarters of Canon, McDonalds, Reebok, and Chevrolet.²³⁸

Indeed, the activity involving and surrounding international figure skating judging and officiating is clearly connected to commercial activity. The view that the actual judging and officiating does not involve a commercial transaction is too simplistic. In *Lopez*, the government unsuccessfully argued that possession of a firearm in a school zone may result in violent crime, which may affect the national economy by spreading the cost of violent crime through the population as well as by reducing the likelihood of travel to crime ridden areas.²³⁹ There is no need, however, to pile “inference upon inference”²⁴⁰ when evaluating the commercial nexus between fraudulent judging and officiating and interstate commerce. The effect on interstate commerce is more substantial where fraudulent judging and officiating has the potential to decrease overall travel, ticket sales, souvenir sales, and economic benefits.

Furthermore, it follows that corporate sponsors and television networks will be less likely to pay extraordinary prices associated with international figure skating events if there is a widespread perception of fraudulent judging and officiating. In fact, soon after the Salt Lake Scandal, Olympic and figure skating sponsor Nu Skin admitted that it will become more vocal about judging irregularities that plague the sport. Visa, another corporate sponsor, said that it intends to work closely with the ISU to maintain the integrity of the Olympic games.²⁴¹ It is even more likely that corporate sponsors would be hesitant to award a gold medallist a lucrative contract if the majority of the public perceived another skater to be the “true” gold medallist.²⁴² By the final week in February, 2002 – just two weeks after the pairs event in Salt Lake City—Proctor and Gamble announced a partnership between Crest Whitestrips and Canadian gold medallists Jamie Sale and David Pelletier.²⁴³ Almost simultaneously, Wheaties announced that

238. *Id.*

239. 514 U.S. at 563.

240. *Id.* at 567.

241. Jill Vardy, *Corporate Sponsors Stand Behind Skating: But Scandal Makes Them “Stand up and Take Note,”* National Post B11 (Feb. 16, 2002).

242. Finally, the *Lopez* Court emphasized the lack of commercial nexus to interstate commerce by concluding that there was no indication that the defendant had moved in interstate commerce. 514 U.S. at 567. Indeed, the most basic connection to interstate commerce pertaining to judging and officiating activity is that the judges, officials, skaters, and spectators move in interstate and foreign commerce to attend the international skating event.

243. *The Skating Source, Who’s smiling now?* <<http://www.skatingsource.com>

Sarah Hughes, the ladies' figure skating Olympic gold medallist, would appear on its cereal box within the same month.²⁴⁴ One must question whether Proctor and Gamble would have offered Sale and Pelletier the contract had they finished, and remained, in second place amid the judging turmoil? Likewise, would Sarah Hughes have been on the March 2002 Wheaties box if the ladies' event had been similarly disrupted by chaos, raising doubts about who was the clear gold medal winner? With these skaters potentially earning two to three million dollars per year from such contracts, corporate America will be forced to evaluate whether a judging scandal might affect marketing potential. Indeed, a holistic evaluation of the judging and officiating clearly demonstrates a commercial nexus.

3. *Jurisdictional Element in Statute*

The proposed law includes an express jurisdictional element to ensure that fraudulent judging and officiating affects interstate or foreign commerce. More specifically, it makes it a criminal activity for any person who moves in, or affects, interstate or foreign commerce to knowingly engage in any fraudulent activity, or attempt to knowingly engage in any fraudulent activity, that may affect the scoring of any skater or team of skaters or the outcome of any international skating event, when such international figure skating event takes place in the United States. As such, the statute is not ambiguous and ensures, through a case by case basis, that the fraud relates to interstate commerce.

In addition to emphasizing that the statute at issue had "nothing to do with 'commerce' or any sort of economic enterprise,"²⁴⁵ the *Lopez* Court focused on the lack of a jurisdictional element to ensure that gun possession affected interstate commerce.²⁴⁶ The Court contrasted the statute with that in *U.S. v. Bass*, where the relevant regulation made it a crime for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm."²⁴⁷ Unlike the

/smiling.shtml> (accessed Mar. 29, 2003). In the summer of 2002, Sale and Pelletier signed a contract to appear in Smucker's *Stars on Ice* tour. See Joe Erbentraut, *theskateblade.com*, *What's Next for the World's Best?* <<http://www.theskateblade.com/features/articles/020623.htm>> (accessed Mar. 29 2003).

244. *The Skating Source*, *Who's smiling now?*, *supra* n. 243.

245. 514 U.S. at 561.

246. *Id.*

247. *Id.* at 561-62 (quoting *U.S. v. Bass*, 404 U.S. 336, 337 (1971)). See also *U.S. v. Morrison*, 529 U.S. 598, 613 (2000) (finding 42 U.S.C. § 13981 (Violence Against Women Act) unconstitutional in part because of lack of express jurisdictional element establishing that the federal cause of action is in pursuit of Congress' power to regulate interstate

statute in *Lopez*, the proposed statute limits its reach to a designated group of judges or officials who have an “explicit connection with,”²⁴⁸ “or effect on,”²⁴⁹ interstate or foreign commerce. As such, the statute establishes that Congress has acted pursuant to its power to regulate interstate commerce.²⁵⁰

B. Proof and Enforcement

The proposed statute requires that the violator knowingly engaged in fraudulent conduct.²⁵¹ This required mental state is different from the mail and wire fraud statutes, which require that the violator acted with specific intent to defraud;²⁵² and the federal securities fraud statute, which requires the government to show that the violator acted willfully.²⁵³ The “knowingly” standard is common among modern criminal statutes²⁵⁴ and is easier to prove than the “intentionally” or “willfully” standard. According to the Model Penal Code, one acts knowingly if “he is aware that it is practically certain that his conduct will cause such a result.”²⁵⁵ Therefore, the prosecution does not need to demonstrate that the violator *intended* to defraud; nor does the prosecution need to prove that the violator intended to violate the law, as is required, for example, by the willfulness standard in Rule 10b-5.²⁵⁶ Rather the prosecution will need to prove that the defendant was aware of a substantial certainty that his or her conduct may have affected the scoring of any skater, team of skaters, or the outcome of the specific international skating event.

The ease with which a prosecutor can prove a violation will vary. It will, of course, be more simple when a figure skating judge tells his colleagues that someone pressured him to judge the way he did regardless of performance quality.²⁵⁷ Likewise, it will be less difficult

commerce).

248. *Id.* at 562.

249. *Id.*

250. *See U.S. v. Morrison*, 529 U.S. at 613.

251. *See supra* n. 186 and accompanying text.

252. *See supra* nn. 28, 60-74 and accompanying text.

253. *See supra* n. 109 and accompanying text.

254. *See e.g.* 18 U.S.C. § 1101 (2002); 18 U.S.C. § 1956 (2002); 18 U.S.C. § 1957 (2002); 18 U.S.C. § 1001 (2002).

255. Model Penal Code § 2.02(2)(b)(ii).

256. Neither the knowledge standard included in the proposed statute, nor the willfulness standard as often interpreted under Rule 10b-5 jurisprudence requires that the defendant engaged in the conduct with knowledge of its *illegality*. *See supra* nn. 111-112; *see also Bryan v. U.S.*, 524 U.S. 184 (1998).

257. *See supra* n. 4.

when “smoking gun” evidence exists, e.g. when there is video evidence showing judges exchanging signals just after individual performances;²⁵⁸ when a federation leader sends a letter to judges to discuss a strategy for their country to “conquer” international figure skating;²⁵⁹ or when one judge tape records another specifying the outcome of an event before the performances begin.²⁶⁰ Indeed, the proposed law is likely to prevent such blatant improprieties, as individuals will be more hesitant to engage in such obvious behavior when threatened with potential fines and imprisonment rather than mere temporary suspension from international judging. More discreet forms of impropriety will be more difficult for prosecutors to prove. Block judging, where a group of judges from various countries agree on the final outcome of an event before it takes place, has plagued ice dancing and will remain difficult to prove when no such smoking gun exists and when any new judging system takes effect permanently. Likewise, cases such as those of Elizabeth Manley and Linda Fratianne, both of whom received Olympic silver medals under the suspicion of judging impropriety,²⁶¹ will remain difficult to prove.

Unfortunately, the proposed law will compete with the subjectivity involved in figure skating judging.²⁶² In many of the cases described above, a judge can, and will, argue that his scoring was based on subjective assessment of the technical and artistic aspects of the skating performance. In fact, following Le Gougne’s denial of judging based on external pressures, she asserted that she scored the Canadian and Russian pair teams according to her “soul and conscience”²⁶³ and in doing so, considered the Russians to be the best. Nonetheless, the presence of a law may impede these more discreet acts of judging and officiating fraud. Although a judge can act individually to affect the scoring and outcome of a competition, the examples above suggest that it is more common for judges and officials to act in concert with other judges.²⁶⁴ The law will cause judges and officials to be more hesitant to approach a fellow judge and suggest the tainting of a competition that will take place in the United States. One will not know whether the person approached will join the illegal

258. See *supra* n. 18 and accompanying text.

259. See *supra* n. 19 and accompanying text.

260. See *supra* n. 17 and accompanying text.

261. See *supra* n. 16 and accompanying text.

262. Regardless of any change in judging rules and procedures, the subjectivity will remain.

263. See *supra* n. 4.

264. See *supra* Introduction.

activity or will, perhaps, act as a whistleblower and notify local authorities of the potential illegality involved. In addition, the proposed law will serve as a model to other countries struggling with federation leaders and judges who engage in fraudulent activity with respect to international figure skating events. Although it is doubtful that federations frequently involved in block judging will advocate similar laws, it is not overly optimistic to expect the proposed law to reduce blatant forms of judging impropriety abroad and, simultaneously, prevent federation leaders from suspending judges who openly refuse to “fix events” and expose impropriety within their federations.²⁶⁵ It is not likely that this law will result in the punishment of many. Nor is it the intention of the law to collect numerous fines or seek imprisonment for many. Rather, the law seeks to control and prevent what is becoming a chronic problem within the sport of figure skating. In doing so, one American law can serve as a symbol and statement to judges, officials and figure skating federations abroad.

V. Support For Congress to Enter the International Figure Skating Arena

A. Globalization of Sport and Protection of American Entertainment

As demonstrated above, each member country of the ISU is regulated by a federation or association. Of course, the ISU has a complete guide of regulations applicable to competitive international figure skating. Therefore, it seems logical that Congress should let private associations regulate the sport without any interference from a governmental body. Due to the globalization of American sport, however, Congress should interfere and oversee that sports taking place on American ground proceed with integrity.

To grasp the globalization of American sport, one must merely consider the example of Michael Jordan. As Michael Jordan appeared on the scene in the early 1980s, US commercial television began to spread.²⁶⁶ A decade later when Michael Jordan and his team the Chicago Bulls were winning National Basketball Association [NBA] Championships, Chicago Bulls games were airing in 93 countries.²⁶⁷ Companies from around the world wanted Jordan for commercials and endorsements, while he was becoming the biggest star in

265. See *supra* n. 21, at 13.

266. Walter LaFabel, *Michael Jordan and the New Global Capitalism*, 69 (W.W. Norton & Co. 1999).

267. *Id.*

Yugoslavia, Italy, Spain, and Hungary. By the late 1990s, the number of Germans playing basketball doubled from ten years before.²⁶⁸ According to one German citizen, “[b]asketball [was] a symbol for the American way of life, like American music, [and] Whoppers.”²⁶⁹ By 1996, 175 countries were able to view NBA games.²⁷⁰

The ability of basketball and American-dominated media to penetrate other cultures fascinated observers, who concluded that the “only true pan-European culture is the American culture.”²⁷¹ Also these observers noted that “European intellectuals hoped to absorb the influence of American celebrities.”²⁷² Analysts concluded that US culture changed other cultures significantly – much more so than those cultures changed how Americans lived and used their leisure time.²⁷³

The globalization of American sport is not limited to Michael Jordan and the NBA. By the early 1990s, baseball and football, combined with basketball, bring in more than \$2 billion a year in world-wide revenues.²⁷⁴ By the mid 1990s, Los Angeles Dodgers games were broadcast live in Japan, where citizens could watch Japanese pitcher Hideo Nomo on their television sets or could analyze his performance on the Internet.²⁷⁵ By 1999 ESPN, a sports channel, broadcasted ESPN International in 21 languages to more than 160 countries, along with its website, radio network, and magazine.²⁷⁶ Indeed, it is not at all surprising that European children walk the streets in Yankees

268. *Id.* at 138.

269. *Id.*

270. *Id.* at 135.

271. *Id.* at 139.

272. *Id.*

273. *Id.* at 140. In addition to viewing Michael Jordan and the NBA on television, other countries became consumed with products and companies that Jordan endorsed. Two of Jordan’s most profitable endorsements were McDonald’s and Nike. *Id.* Richard F. Kuisel, who wrote an account of US cultural power, stated that:

[W]hat is important is that it seems European eating habits have been modified by fast food introduced by McDonald’s. The disappearance of thousands of cafes in Paris as well as the long family lunch amounts to significant social change. Wearing sneakers, no matter how they are advertised represents a new informality in European dress and perhaps even behavior.

Id. at 141.

274. Michael Clough, *The Multi-National Pastime; As Professional Sports go Global, Will Local Communities Be Shunted Aside?* Los Angeles Times A1 (Mar. 31, 1996).

275. *Id.*

276. Tom Hoffarth, *20 Years of ESPN*, Austin American-Statesman C2 (Sept. 5, 1999).

hats.²⁷⁷

Figure skating was, too, part of the escalating globalization during the 1990s. In 1993, a male assailant struck United States Olympic-hopeful Nancy Kerrigan across the knee with a leaden pipe.²⁷⁸ As the world learned that rival US skater Tonya Harding was behind the attack, the sport of figure skating was noticed around the world.²⁷⁹ Advertising and television executives took notice of the sport's rising popularity and devoted more time and resources towards its promotion. By the mid 1990s all three major American television networks rushed to embrace figure skating and its annual worldwide television market of \$160 million.²⁸⁰ The ISU signed contracts with five international networks, including those broadcasting in America, Russia, Europe, Canada, and Japan.²⁸¹

As a result of increased globalization of American sports, Congress should have concern about the message that American culture is spreading. Congress must intervene to ensure that American sports are played with the level of integrity that we wish to represent abroad. Indeed, neither Congress nor the public would seek to endorse the spreading of American culture complete with fraud and lack of integrity. Although international figure skating involves figure skaters from around the globe, and is not limited to American soil such as the NBA or major league baseball, international skating events that take place in the United States are broadcast around the world and offer a taste of America to spectators abroad. American culture is exhibited through the American skaters²⁸² as well as through the broadcast of the host city and its surroundings.²⁸³ Congress' willingness to intervene to ensure that figure skating events proceed without fraud will demonstrate its devotion to sending an ethical picture of American culture. As suggestions regarding the impropriety

277. Steven Zeitchick, *Soccer Reigns*, Los Angeles Times B9 (June 24, 2002).

278. See *supra* n. 237.

279. See *infra* n. 284.

280. Emily Mitchell, *Ice Age Cometh*, available at <<http://www.time.com/time/international/1996/960325/sport.html>> (Mar. 25, 1996).

281. *Id.*

282. American skaters have contributed significantly to the popularity of figure skating around the globe. Peggy Fleming and Dorothy Hamill are well known outside the United States. Furthermore, numerous professional competitions and tours have developed since the mid 1990s, thereby allowing United States Olympic skaters, including Scott Hamilton, Tara Lipinski, Kristi Yamaguchi, Brian Boitano, Nancy Kerrigan, and Paul Wylie to perform around the world, thereby allowing them to share American skating style and strength with the world.

283. It is usual for the broadcasting station to show clips of the host city, its citizens, and its well known sites.

of six judges surface months after the Salt Lake Scandal, it is evident that the picture of American sporting events is serving as an embarrassment abroad, rather than as a model of American culture and standards.

Congress should also intervene to protect the American public. In recent years, skating popularity has exploded, making it second only to football as the most viewed sport in the United States.²⁸⁴ It is rare for a week to pass between October and March where there is not a United States televised figure skating exhibition or official competition. Of course, the women's figure skating event attracted the largest United States television audience of the 2002 Winter Olympic Games. American's enjoyment of figure skating extends beyond watching amateur competitions. By the mid 1990s, more than 500,000 spectators in 76 North American cities paid \$25 or more to watch top rate professional skaters perform in "Stars on Ice,"²⁸⁵ a touring show established by 1984 Olympic gold medallist Scott Hamilton. Clearly, countless Americans view figure skating events as entertainment. Congress should act to ensure that the entertainment is legitimate.

Congress has, in the past, intervened to protect the American public's right to legitimate entertainment. In the 1950s, quiz show producers defrauded the American public of their right to enjoy honest and legitimate television and radio. Producers of several popular quiz shows supplied the contestants with scripts of answers. In late 1959, one popular quiz show contestant finally confessed to a congressional subcommittee that he knowingly participated in a rigged show.²⁸⁶ The hearings allowed Congress to uncover a "complex pattern of calculated deception of the listening and viewing audience."²⁸⁷ Furthermore, Congress concluded that "[c]ontests of skill and knowledge . . . were revealed as crass frauds."²⁸⁸ As a result, Congress passed 47 U.S.C. § 509, making it a criminal offense for any person, with intent to deceive the listening or viewing public, to engage in specified behavior that had the effect of prearranging or predetermining any contest, to engage in any artifice or scheme for the purpose of prearranging, or predetermining the outcome of a contest of

284. Mark Sappenfield, *Why Women's Figure Skating Has US Fans Hooked* <<http://www.csmonitor.com/2002/0219/p01s01-ussc.html>> (Feb. 19, 2002).

285. See Mitchell, *supra* n. 280.

286. *A Moment in Time Archives: TV Quiz Show Scandal*, Vol. 4, No. 55 <http://www.ehistory.com/world/admit/display.cfm?amit_id+1874> (Nov. 21, 2001).

287. 1960 U.S. Code Cong. and Adm. News, p. 3533.

288. *Id.*

intellectual knowledge.²⁸⁹ Any violator was subject to a fine of not more than \$10,000 or imprisonment of not more than 1 year, or both.²⁹⁰

The proposed law allows Congress to act similarly to protect Americans from being subjected to calculated fraud and deception when viewing entertainment. Just as people expected to receive honest quiz show entertainment in the 1950s, a large number of Americans expect to view international figure skating events free from judging and officiating fraud. Congress should, once again, intervene to protect a popular source of family entertainment.²⁹¹ Such intervention is even more appropriate where, like international figure skating, many Americans purchase tickets to attend international skating events. In doing so, Congress can protect Americans' right to honest entertainment and investments.

B. Achieving a Purpose of Punishment and Regulating Immoral Behavior

Deterrence is a well known purpose of criminal punishment.²⁹² Unlike retribution, which imposes punishment for a wrong and not to achieve social benefits, deterrence sees punishment as a tool of social control.²⁹³ As such, punishment is used to inform and to dissuade potential criminals from acting similarly or to dissuade a particular criminal from reoffending.²⁹⁴ Deterrence is often seen as a useful tool when applied to white collar crimes, unlike violent crimes where ret-

289. 47 U.S.C. § 509 (2000):

It shall be unlawful for any person, with intent to deceive the listening or viewing public – (1) To supply to any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill any special and secret assistance whereby the outcome of such contest will be in whole or in part prearranged or predetermined. (2) By means of persuasion, bribery, intimidate, or otherwise, to induce or cause any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill to refrain in any manner from using or displaying his knowledge or skill in such contest, whereby the outcome thereof will be in whole or in part prearranged or predetermined. (3) To engage in any artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance.

290. *Id.* at 509(c): “Whoever violates subsection (a) of this section shall be fined not more than \$10,000 or imprisoned not more than one year, or both.”

291. See Mitchell, *supra* n. 280. When referring to figure skating, Olympic skating coach Doug Leigh said, “[t]he kids watch it, the mum watches it, the dad watches it. It’s about as well-rounded family entertainment as you’re going to get.” *Id.*

292. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution As An Articulated Purpose of Criminal Punishment*, 27 Am. Crim. L. Rev. 1313 (2000).

293. *Id.* at 1316.

294. *Id.*

tribution is a more applicable purpose.²⁹⁵ The criminal sanctions associated with the proposed law will serve to deter judges and officials from engaging in fraudulent behavior when presiding over international competitions on United States territory. Even assuming that Le Gougne feared that any unwillingness to cooperate with the Gailhaguet's instructions would destroy her judging career, it is likely that she would be hesitant to cooperate knowing that such actions could bring about criminal liability. The current sanction – suspension from judging – is far less of a deterrent than facing a large fine and potential imprisonment.²⁹⁶

Despite any need to protect American entertainment and spread a global message regarding American culture and sport, some would likely argue that congressional focus should be on other more important issues.²⁹⁷ Similarly, others will argue that our judicial system is saturated enough and does not need to preside over fraudulent figure skating judges and officials. Even while conceding that there are some parallels between recent judging and officiating activity to the honest service theory of mail, wire, and securities fraud, many would argue that any fraud committed by figure skating judges or officials do not compare to the seriousness or complexity of such federal crimes.

First, the prosecution of Tokhtakhounov on federal conspiracy charges pertaining to fixing the 2002 Olympic pairs event should, of course, demonstrate our government's interest and concern. Second, the acceptance of punishing immoral behavior is well known. In the 1950s, Patrick Devlin, an English judge, began to publicly defend criminalizing immoral conduct in England.²⁹⁸ Devlin argued that criminal law should function “to enforce a moral principle” and often, “nothing else.”²⁹⁹ The law, according to Devlin, obtained such authority from a “shared, public sense of morality,”³⁰⁰ the mainte-

295. *Id.* at 1318.

296. In addition to sending a message to all current and future judges and officials involved in international figure skating, the law would send a message to other countries that host international skating events. In doing so, the United States would be the first to enter the international figure skating arena to ensure integrity in judging and officiating, and would therefore serve as a trend setter to other countries considering how to supplement skating federation rules regarding ethical judging and officiating.

297. *The McLaughlin Group Library Transcript*, <<http://www.mclaughlin.com/library/transcript>> (Feb. 16, 2002). (“We’ve got enough criminal laws and we’ve got enough trouble enforcing them, and we should concentrate on that.”)

298. Hamish Stewart, *Legality and Morality in H.L.A. Hart's Theory of Criminal Law*, 52 S.M.U. L. Rev. 201, 212 (1999).

299. *Id.* at 212.

300. *Id.*

nance of which was vital to the cohesion of society.³⁰¹ Proponents of Devlin argue that to protect citizens against injury, harm, offense, and indecency, the law must punish immorality. Dissenters, led by scholar H.L.A. Hart, argue that the line regarding enforcement and non-enforcement is not clear,³⁰² although the sanctioned conduct does seem to include various ideals of virtue and character and fairness.³⁰³ Hart agrees to the extent that the law should enforce morality when addressing theft, murder, and rape, but opposes punishing immorality when the conduct addressed is not harmful.³⁰⁴ In doing so, Hart and his supporters challenge the thesis that society will fall apart if it fails to enforce morality through criminal law.³⁰⁵

Putting aside the argument set forth regarding illegality in Part II, international figure skating judging and officiating has become immoral. It has become all too common for judges to vote based on outside pressures or desires for personal outcomes rather than based on technical and artistic standards they are expected to evaluate. In doing so, they have tarnished skaters' lives, spectators' entertainment, public trust, corporate confidence, and the delicacy of the sport.³⁰⁶ A mere glance at the ISU regulations indicates that judges involved in such inappropriate conduct are not conforming to the character expected by the body governing them,³⁰⁷ the skaters performing before them, or the public viewing their decisions. In addition to including ideals of character, Devlin and supporters indicate that moral conduct represents principles of fairness.³⁰⁸ There can be little doubt that the improper judging and officiating is riddled with unfair treatment towards the internationally competitive figure skaters —the primary victims of the judges actions – who potentially face life altering consequences as a result of the conduct at issue. The unfairness, however, extends to the skaters' coaches and trainers, all whom seek to obtain a monetary and emotional benefit from their protégés' successes. Of course, the unfairness reaches spectators and corporate

301. *Id.*

302. Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 Wm. & Mary L. Rev. 927, 930 (1999).

303. *Id.*

304. Stewart, *supra* n. 298 at 218.

305. *Id.* at 215.

306. As Sale and Pelletier's scores appeared in the Salt Lake Olympic arena, figure skating commentator and choreographer Sandra Bezic stated that she was embarrassed for the sport of figure skating. Serge Schmemmann, *Drama and Scandal Make the Olympics*, The New York Times (February 19, 2002) D1.

307. See International Skating Union Special Regulations, *supra* n. 125.

308. See Stewart, *supra* n. 298 at 212.

America, both of whom contribute to the funding of the international figure skating events. As such, Devlin's theory supports criminalizing the conduct at issue to enforce a "shared, public sense of morality," which would hold that introducing fraud into figure skating judging violates the principles expected of society.³⁰⁹

Judging and officiating activity does not, and cannot, compare to the harm and injury inflicted by theft, murder, rape, and the like. Such a conclusion, however, does not imply that the current wave of improper judging and officiating is not harmful. Improper judging harms the affected competitors both emotionally and financially and simultaneously harms those secondarily affected from a financial standpoint. Finally, the sport of figure skating itself is harmed, both its popularity and ability to provide entertainment to Americans and persons abroad.

VI. Conclusion

After nearly ten years of blatant fraud in international judging and officiating, and perhaps more than twenty years of more discrete acts, it is time for action beyond suspensions and suggestions to alter judging procedures. Judges and officials continue to engage in actions comparable to federal fraud, when they deprive skaters and the public of their intangible right to honest services and withhold material information that is likely to have significantly altered the total mix of information available to ticket purchasers. Such behavior is parallel to that which the United States Congress and SEC have sought to prevent through mail, wire, and securities fraud statutes and rules.

Using its power pursuant to the Commerce Clause, Congress should intervene to strengthen the sport of figure skating, while simultaneously seeking to protect American culture and entertainment. As the globalization of sports has brought American figure skating broadcasts into millions of homes abroad, Congress must act to ensure that the broadcasts are honest and symbolic of American values and principles. Furthermore, with figure skating second only to football in viewing popularity, Congress can simultaneously ensure that unlike the quiz shows of the past, figure skating delivers the entertainment value that spectators expect to receive.

The proposed law will serve as a deterrent and will, in turn, reduce fraudulent judging and officiating activity. In addition to cautioning persons involved in international figure skating events hosted

309. See Stewart, *supra* n. 298 at 212.

in the United States, it will send a strong message reminding those abroad that the United States will take the lead both to protect athletes from potentially being defrauded of their future livelihoods and long awaited dreams, and from being defrauded of their investments and right to entertainment. Finally, the law will help the sport of figure skating glide from a patch of very thin ice to a significantly more stable arena.